THE

MONTHLY LAW REPORTER.

NOVEMBER, 1852.

Notes on Leading Cases.

THE CASE OF WILLIAM YORK.[1]

Infants, Criminal Liability of — Confession.

At Bury Summer Assizes, 1748, William York, a boy of ten years of age, was convicted before Lord Chief Justice Willes for the murder of a girl of about five years of age, and received sentence of death. But the Chief Justice, out of regard to the tender years of the prisoner, respited execution, till he should have an opportunity of taking the opinion of the rest of the Judges, whether it was proper to execute him or not, upon the special circumstances of the case; which he reported to the Judges at Serjeants Inn in Michaelmas Term following.

The boy and girl were parish children, put under the care of a parishioner, at whose house they were lodged and maintained; on the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together; when they returned from work, the girl was missing; and the boy being asked what was become of her, answered that he had helped her up and put on her clothes, and that she was gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man under whose care the children were, observed that a heap of dung near the

[1] Foster's Crown Law, 70.

house had been newly turned up; and upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner.

Upon this discovery, the boy, who was the only person capable of committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied.

When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning (which was not true, for the bed was searched and found to be clean), that thereupon he took her out of the bed, and carried her to the dung-heap; and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could.

The boy was the next morning carried before a neighboring Justice of the Peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The Justice of the Peace very prudently deferred proceeding to a commitment, till the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in, if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself. And then ordered him into a room, where none of the crowd that attended should have access to him.

When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession; upon which he was committed to gaol.

On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the Justice of the Peace; and of many declarations to the same purpose which the boy made to other people after he came to gaol, and even down to the day of his trial. For he constantly told the same story in substance, commonly adding that the devil put him upon

committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted.

Upon this report of the Chief Justice, the Judges having taken time to consider of it, unanimously agreed,

1st. That the declarations stated in the report were evidence proper to be left to the jury.

2d. That supposing the boy to have been guilty of this fact, there are so many circumstances stated in the report, which are undoubtedly tokens of what my Lord Chief Justice Hale somewhere calleth a mischievous discretion, that he is certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought, that children may commit such atrocious crimes with impunity.

There are many crimes of the most heinous nature, such as in the present case the murder of young children, poisoning parents or masters, burning houses, &c., which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old may savor of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offences; and as the sparing this boy, merely on account of his age, will probably have a quite contrary tendency, in justice to the public, the law ought to take its course; unless there remaineth any doubt touching his guilt.

In this general principle all the Judges concurred. But two or three of them, out of great tenderness and caution advised the Chief Justice to send another reprieve for the prisoner: suggesting that it might possibly appear on further inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice.

Accordingly the Chief Justice did grant one or two more reprieves; and desired the Justice of the Peace who took the boy's examination, and also some other persons in whose prudence he could confide, to make the strictest inquiry they could into the affair, and report to him; at length he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but before the expiration of that reprieve, execution was respited till further order, by

warrant from one of the secretaries of state. And at the Summer Assizes, 1757, he had the benefit of his Majesty's pardon, upon condition of his entering immediately into the sea service.[1]

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[1] William York's case has long been a leading case on the liability of infants for crimes. We propose to examine the law on this subject, under the following divisions.

1. Their liability below the age of seven years.
2. Their liability between the ages of seven and fourteen.
3. Their liability above the age of fourteen.

1. *Their liability below the age of seven years.*

It is laid down by most elementary writers upon criminal law, that if an infant be under seven years of age, he cannot be guilty of felony, whatever circumstances may appear proving his discretion; for, *ex presumptione juris*, he cannot have discretion, and no averment shall be received against that presumption. 1 Hale's Pleas of the Crown, 27; Plowden, 19 a; Dalton's Justice, c. 147, p. 334; 1 Hawk. P. C. 2; 4 Bl. Comm. 22, 23.

It is conceived, however, that this position is not well founded, and that if an infant under seven is proved to have sufficient discretion, and to know good from evil, he is liable to prosecution, as well as one above that age. The maxim *malitia supplet ætatem*, applies as well to one under, as to one over the age of seven years. There seems to be no reason why any one who, like Crichton, Pascal, or White, at a very early age, exhibits evidence of unusual mental development, and strong powers of mind, and a capacity of knowing good from evil, should not be as responsible for his intelligent acts, on the day before, as well as the day after his arrival at the age of seven years. The assumption of seven years as the commencement of criminal responsibility, is entirely arbitrary; and the fact that elementary writers have quite generally agreed upon such a principle of law, can hardly be relied upon as a defence, should a case arise where the facts clearly show that an infant under seven, had, with actual malice, and knowledge of his wrongful act, committed an offence under the law. Besides, this point may be considered not entirely without direct authority, for there is a precedent in the register, fol 309, b., of a pardon granted to an infant within seven years, who was indicted for homicide: the jury having found that he did the fact before he was seven years old. 1 Hale's Pleas of the Crown, p. 28, n. e.

2. *Their liability between the age of seven and fourteen.*

But whatever may be the law relative to persons under the age of seven, all authorities agree that, at that age, criminal responsibility commences, and, subject to the presumption in favor of infants, they are amenable for any and all crimes committed by them, whether felonies or misdemeanors.

This may be considered,

a. In the instances where infants under fourteen have been indicted.

b. To convict children under fourteen, the prosecution must clearly prove that the infant, in doing the act, knew that he was doing wrong.

c. The liability of infants for the crime of rape.

a. Adjudged cases on the liability of infants.

In Dalton's Justice, p. 334, c. 147, it is said "An infant of eight years of age, or above, may commit homicide, and shall be hanged for it, viz. if it may appear, (by hiding of the person slain, by excusing it, or by any other act,) that he had knowledge of good and evil, and of the peril and danger of that offence." See also Staunforde, Les Plees del Coron, c. 19; Year Books, 3 Henry VII, p. 1; 2 Bl. Comm. 23.

It is believed that the youngest person ever executed for crime, was a boy, named Dean, between eight and nine years of age, who, in 1629, was

found guilty of burning two barns at Windsor, and it appearing that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was hanged accordingly. See Emlyn's edition of Hale's Pleas of the Crown, p. 25, note (n).

So an infant of the age of nine years, killed his companion of the like age, and hid the body and the blood. He also confessed the felony, and was adjudged to be hanged: but judgment was respited in order that he might obtain a pardon. Fitzherbert's Report Corone, 57, B; Ib. 133; 1 Hale's Pleas of the Crown, 27.

So an infant, ten years old, named Spigurnel, was convicted of killing his companion, afterwards hiding himself; and it appearing by his hiding himself, that he could discern between good and evil, he was hanged. *Spigurnel's case*, (1 Hale's P. C. 26); Fitzherbert's Report Corone, 118.

In 4 Law Reporter, p. 329, (1842) is the report of the trial of a boy *twelve* years of age for the murder of his companion and playmate, aged only thirteen. The principal evidence of the felonious intent was the dying declaration of the deceased. Circumstances strongly corroborated the fact of a consciousness of guilt on the part of the accused; but he was acquitted by the jury.

The liability of infants for crimes is well discussed in *The State* v. *Goin*, 9 Humph. 175, (Tenn. 1848) The prisoner was about twelve years old, and was convicted of an assault and battery by the verdict of a jury. The proof was, that the assult was prompted by malice and revenge, and committed upon an infant incapable of self-defence. The court below refused to sentence the prisoner, on the ground that a person under fourteen, although possessed of sufficient capacity to distinguish between good and evil, could not be punished criminally for his acts. But this was reversed on error, and judgment rendered upon the verdict. See *Com.* v. *Keagy*, 1 Ashmead, 248.

In like manner Alice De Waldborough, of the age of thirteen years, was convicted of killing her mistress, and burnt. Fitzherbert's Corone, 118, 170; 12 Ass. 30; 1 Hale's Pleas of the Crown, p. 26.

But an infant two years old is not liable, *criminaliter*, for a nuisance erected on his land. *People* v. *Townsend*, 3 Hill, 479, (1842.) And one, only eleven, seized of lands, in the actual occupation of his guardian in socage, is not indictable for the non-repair of a bridge, *ratione tenuræ*. *Rex* v. *Sutton*, 5 Nev. & Man. 353, (1835)

An infant may be indicted for a riot. *Regina* v. *Tanner*, 2 Ld. Raym. 1824, (1707) And one, nineteen years of age, is indictable for obtaining goods under false pretences. *People* v. *Kendall*, 25 Wend. 399, (1841.)

b. The fact of guilty knowledge must be distinctly made out.

The presumption of law in favor of infants under fourteen, and the necessity of satisfying the jury that the child, when committing the act, must have known that he was doing wrong, is well illustrated by the case of *Rex* v. *Elizabeth Owen*, 4 Carrington & Payne, 236, (1830,) where a girl ten years of age was indicted for stealing coals. It was proved that she was standing by a large heap of coals belonging to the prosecutor, and that she had a basket upon her head, containing a few coals, which the girl herself said she had taken from the heap. Littledale, J., in summing up to the jury, remarked, "In this case there are two questions: First, Did the prisoner take the coals; and, second, if she did, had she at the time a guilty knowledge that she was doing wrong. The prisoner is only ten years of age, and, unless you are satisfied by the evidence, that in committing this offence she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is, that he or she has not sufficient capacity to know that it is wrong, and such person ought not to be convicted, unless there be evidence to satisfy the jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong." The jury returned a verdict of "Not guilty," adding, "We do not think the prisoner had any guilty knowledge."

So in *The People* v. *William Davis*, 1 Wheeler, C. C. 230, (1823.) In

an indictment for larceney, the defendant being not yet fourteen years old by a few weeks, the taking was clearly proved, but no evidence was offered of his capacity to commit crime, and the jury were instructed that the law presumes an infant under fourteen incapable of committing crimes, "and in order to show his liability, it was necessary to prove his capacity." And there being no evidence either way upon the point, the defendant was acquitted. The same principle was adopted in *Walker's Case*, 5 City Hall Recorder, 137, (1820.)

This doctrine was again distinctly affirmed in *The Queen* v. *Sydney Smith*, 1 Cox, C. C. 260, (1845,) where a boy, ten years of age, was indicted for maliciously setting fire to a hay-rick. The act of firing was clearly proved, but there was no proof of a malicious intention. Erle, J., told the jury, "Where a child is under the age of seven years, the law presumes him incapable of committing a crime; after the age of fourteen, he is presumed to be responsible for his actions as entirely as if he were forty; but between the ages of seven and fourteen, no presumption of law arises at all, and that which is termed a malicious intent, a guilty knowledge that he was doing wrong, must be proved by the evidence, and cannot be presumed from the mere commission of the act."

This fact of guilty knowledge may often appear from the circumstances of the case, as, if the prisoner conceals himself, denies the act, or in any way shows a consciousness that he was doing wrong.

Thus, in the case of *The State* v. *Mary Doherty*, 2 Overton, (Tenn. 1806,) where a girl between twelve and thirteen years of age was indicted for murder, the jury were instructed, "That if an infant is under fourteen and not less than seven, the presumption of law was, that he could not discern between right and wrong. But this presumption is removed if from the circumstances it appears the person discovered a consciousness of wrong. That this fact of guilty knowledge may appear from the circumstances of the case, see *Stage's Case*, 5 City Hall Recorder, 177, (1821,) where a boy of the age of eight years, was indicted for larceny of a lady's dressing-box and jewelry. The owner detected the boy going out of the house with the box under his arm; she seized him, and he tried to bite her and retain the box by force; he then began to cry, and said another boy told him to take away the box. No other evidence of capacity was offered. The jury were told that they must be "satisfied that he had a capacity of knowing good from evil; that this might be proved by extrinsic testimony, or it might arise from the circumstances of the case. Here a concealment and an attempt to escape appear; it was for the jury to say that the defendant knew that he was doing wrong." The defendant was convicted.

c. The liability of infants for the crime of rape.

The liability of infants for the crime of rape, and similar offences, and the conflict of the law in England and America on the subject, deserves attention. In England it has been frequently held at *nisi prius*, that a boy under the age of fourteen years, could not, as a matter of law, be convicted of an assault with intent to commit a rape. *Rex* v. *Eldershaw*, 3 Carrington & Payne, 396, (1828,) Vaughan, Baron, saying, "This boy being under fourteen, cannot, by law, be found guilty of a rape, except as a principal in the second degree. From his age, the law concludes it is impossible for him to complete the offence, and that, in my judgment, must be held to negative the intent alleged in the first count."

Rex v. *Goombridge*, 7 C. & P. 582, (1836,) before Gaselee, J., is to the same effect. And this doctrine has been carried so far in England, that if the prisoner is under fourteen, no evidence is admissible that, in point of fact, he had arrived at the age of puberty, and could commit the offence of rape. *Regina* v. *Phillips*, 8 C. & P. 736, (1839); and *Regina* v. *Brimilord*, 9 C. & P. 366, the same rule has been applied to a charge of "feloniously and carnally knowing and abusing" a female infant under ten years of age. *Regina* v. *Gordon*, 8 C. & P. 118, (1839)

On the other hand, a more reasonable rule has been adopted in this coun-

try, and it has been here held, that while the presumption of law is, that infants under fourteen cannot commit the crime of rape, such presumption must give way to proof, that the prisoner has arrived at the age of puberty, and was capable of emission, and consummating the crime. *Williams* v. *The State*, 14 Ohio, 222, (1846,) where a very able opinion is pronounced by Read, J. See also *Com.* v. *Lanigan*, 2 Law Rep. 49, (1834.)

So in *Commonwealth* v. *Green*, 2 Pick. 380, (Mass 1824,) an infant under fourteen years of age was held indictable for an assault with intent to commit a rape, although it seems to have been admitted by the court in the same case that he could not be guilty of the crime itself; a distinction it seems difficult to support. But the grounds of this decision (Parker, Ch J. dissenting,) are thus stated: — "The law which regards infants under fourteen as incapable of committing rape, was established *in favorem vitæ*, and ought not to be applied by analogy to an inferior offence, the commission of which is not punished with death. A minor of fourteen years of age, or just under, is capable of that kind of force which constitutes an essential ingredient in the crime of rape, and he may make an assault with an intent to commit that crime, although by an artificial rule he is not punishable for the crime itself. An intention to do an act does not necessarily imply an ability to do it; as a man who is emasculated may use force with intent to ravish, although possibly, if a certain effect should be now, as it was formerly, held essential to the crime, he could not be convicted of a rape."

But at the age of fourteen all presumption in favor of the infant ceases, as has been directly adjudged. Thus, in *The State* v. *Handy*, 4 Harrington, 566, (New Jersey, 1845,) a boy between fourteen and fifteen was indicted for an assault with intent to ravish. The court said, that under fourteen a boy was deemed by law incapable of committing a rape, and therefore could not be convicted of an assault with intent to commit; but that after fourteen, he was presumed capable, until the contrary was shown, and the prisoner was convicted.

3. *The liability of infants above the age of fourteen.*

Here all authorities agree that, with but a single class of exceptions, entire criminal responsibility commences, and the presumption of incompetency wholly ceases. Blackstone, on this point says: "The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not repairing a bridge, (see *Rex* v. *Sutton*, 4 Nev. & Mann.) or a highway, and other similar offences. For, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, or a battery, or the like, (which infants, when full grown, are at least as liable as others to commit,) for these an infant, above the age of fourteen, is equally liable to suffer as a person of the full age of twenty-one years." See also 1 Hale, P. C. 20 – 22.

The question has been much discussed, whether the confessions of an infant are admissible against him, in proof of the commission of crime. And it has been sometimes thought that, as in a civil case, an infant is not bound by his admissions and declarations, so in a criminal case, his declarations of his own guilt are not admissible, and if so, are not sufficient proof of the commission of the crime.

But this reasoning seems not to be supported, and it is well settled upon the authorities, that the confessions of an infant, if otherwise competent, are admissible against him in the same manner as confessions of adults. *Rex* v. *Wild*, 1 Moody, 452, (1835); *Rex* v. *Upchurch*, 1 Ib C. C. 465, (1835); *Mather* v *Clark*, 2 Aiken, 209, (Vermont, 1827); *Commonwealth* v. *Zard*, cited Ros Cr. Ev. p. 38, note.

This question seems to have received more consideration in this country than in England. Thus, in *The State* v. *Aaron*, 1 Southard, (New Jersey, 1818,) a slave of the age of ten years and ten months, was indicted for murder, and it was much discussed whether his confessions of the crime

were admissible in evidence. It was held, that they were admissible, but to furnish the ground of a conviction, they ought to be clear and pregnant, and corroborated by circumstances, and made understandingly.

One of the most striking criminal trials to be found on record, was that of *The State* v. *James Guild*, 5 Halsted, 163, (New Jersey, 1828.) There the prisoner, aged twelve years and five months, was indicted for the murder of Catharine Beakes. His own confessions were the principal evidence; the *corpus delicti* being otherwise proved. The court held this sufficient, and the boy was convicted and executed.

So in *The State* v. *Mary Bostick*, 4 Harrington, 563, (New Jersey, 1845,) a servant girl, twelve years old, was indicted for arson. She was proved to be a "shrewd, sensible, and artful child." The question before the court was, whether her admissions were evidence. The Chief Justice said — "If she has such mental capacity as renders her amenable to law for the commission of crimes, she has sufficient capacity to make a confession of guilt." But the confessions having been extorted by promises, were held inadmissible, and she was acquitted.

An infant defends an indictment in the same manner as an adult. He has the same right to appear and defend himself by attorney, or in person; it is error therefore to assign him a guardian, and try him upon a plea put in for him by such guardian. *Wood* v. *The Commonwealth*, 3 Leigh, 743, (Virginia, 1827); *Regina* v. *Tanner*, 2 Ld. Raym. 1284, (1707)

The consequences of a conviction for crime, seem to be the same, in the cases of an infant, as in those of other persons, and if an infant is convicted of a riot, and fined, his property is liable to pay the fine and costs, in the same manner, as is that of an adult. *Beasley* v. *The State*, 2 Yerger, 481, (1831.)

Recent American Decisions.

Supreme Judicial Court of Massachusetts, Berkshire, ss., September Term, 1851.—Opinion delivered Sept. 1852.

Locke *v.* Bennett.

Powers and Duties of Auditors.

Where a case was referred to an auditor under the statute to state the account between the parties, and at the hearing before the auditor it appeared that the articles charged in account by the plaintiff against the defendant were procured of the plaintiff by one R., and it was made a question whether the said R. was the authorized agent of the defendant to procure the articles on his account, and the auditor passed upon the question of R.'s authority; it was *held*, that the auditor had power to settle the question of R.'s authority — his duty being to state the account between the parties, and there being no account to state unless R. was the agent of the defendant to make purchases on his account.

The facts in the case sufficiently appear in the opinion of the court, which was delivered by

Fletcher, J. — It does not appear from the bill of exceptions in this case what was the nature of the action, but it must be taken for granted that it was properly referred to an auditor.

The case having been referred to an auditor, when it came on for trial in the court below, the plaintiff offered

the report of the auditor in evidence. The defendant objected to the admission of the report in evidence, because the auditor passed upon the question, whether one Ray, named in the report, was the authorized agent of the defendant, to make the purchase of the goods charged, and moved that that part of the report be stricken out, because the auditor had no authority to pass upon the question.

The court overruled the objection, and ruled that the auditor had authority to pass upon that question, as incidental to the matter referred, and instructed the jury, that the report was *primâ facie* evidence of the right of the plaintiff to recover the amount reported by the auditor, he having found that said Ray was the authorized agent of the defendant to purchase the goods charged.

The jury having found a verdict for the plaintiff, for the full amount reported by the auditor, the defendant excepts to the foregoing ruling and instruction of the court.

It appears from the statement of the case, that the articles charged in account by the plaintiff, against the defendant, were procured of the plaintiff, by one Ray, and in the hearing before the auditor, it was made a question, whether the said Ray was the authorized agent of the defendant, to procure the articles on his account.

The single question now presented is whether, or not, it was within the scope of the authority of the auditor, for the purpose of stating the account between the parties, to consider and decide the question, whether, or not, Ray was the authorized agent of the defendant, to purchase, on his account, the goods charged by the plaintiff, in account against the defendant. This is a very simple question in form, but one of great practical importance, vitally affecting the power, and consequently the usefulness of auditors. There are several cases in our reports, in which questions touching particular proceedings of auditors, have been raised and settled; but there is no case in which the general nature of their duties has been particularly considered, or in which their general powers have been examined and defined.

It is desirable to ascertain the true principle upon which the question raised in the present case should be decided; and to do so, it is necessary to look somewhat into the nature of the duties, and the extent of the powers, of an auditor.

The office of auditor is one of great antiquity in the common law. The old action of account was in use as early as the time of Henry III., and the auditor is an essential part of the machinery in that proceeding. In that action, if the plaintiff succeeds, there are two judgments; the first is, that the defendant do account, *quod computet*, and auditors are thereupon assigned by the court to take the account. The proceedings before the auditor are by formal pleadings, the plaintiff counting, or charging, what he claims to be due to him, and the defendant putting in a plea, or discharge before the auditor, from the various items charged against him. If the pleas in discharge be traversed, or denied, or their legal validity be demurred to by the plaintiff, so that the parties are at issue in law or fact, the auditor must certify the record to the court, who will either award a *venire facias* to try the issue, or give judgment on the demurrer. The necessity of sending these issues of fact and law, found before the auditor, to the court, to be there tried, before the auditor can proceed to examine the vouchers of the items of account, occasions difficulties and delays, and has, to say the least, been among the evils which have brought this action of account into disfavor and disuse. Lord Hardwicke observed, on this subject, that the opportunity which the defendant has, of delaying the proceedings, by raising a succession of issues, triable in a formal way, like so many separate actions, has brought the action of account into disuse. *Ex parte, Bax*, (2 Ves. Sen. 388.)

But still in *Godfrey* v. *Saunders*, (3 Wilson, 94,) the machinery of the action of account, though somewhat rusty by disuse, was operated so successfully, as to work out an account in two years, though the parties had been litigating in chancery, for the same purpose, but without success, for fourteen years. In a more recent case this action was resorted to with success, in a case involving complicated transactions. *Baxton* v. *Hozier*, (7 Scott, 233.)

But, beside the evils resulting from the restricted power of the auditor, and other defects in this mode of proceeding, the action of account, itself, applies only to particular classes of accounts, so that there were some cases in which mutual accounts could scarcely be adjusted, excepting through the medium of the Court of Chancery. Equitable relief was originally afforded in the Court of Chancery, in

cases of account, on the ground that the remedy, in ordinary courts of law, was unsatisfactory and inadequate, and hence it came to be laid down as a rule, that such equitable relief should be granted in nearly all cases. The modern doctrine, as laid down by Chief Baron Alexander is, that to induce the Court of Chancery to interfere in ordinary cases of account, the account must be such as could not possibly be taken, justly and fairly, in a court of law. *Frietas* v. *Dos Santos*, (1 Y. & Jerv. 576.)

The course of proceeding in cases of account, in chancery, has always been, when a case comes to a hearing, at once, to refer the matter to one, or more, of the masters, to take the accounts. The system of referring matters of account to the master, can be traced back to the time of Lord Bacon, whose order on the subject is as follows: — "But generally matters of accompt, excepting in very weighty causes, are not fit for the court, but are to be prepared by reference, with this provision, nevertheless, that causes come first to hearing, and, upon the entrance into a hearing, they may receive some direction, and be turned over to be considered and prepared." Tothill, p. 49.

The whole business of taking and stating accounts is done by the master. All questions of law and fact, which properly arise in the course of the proceeding, are heard and decided by him. He does not, like the auditor in the action of account, send issues to the court, to be tried, but he, himself, decides all questions as they arise, and keeps the whole business under his own control, till he reports the final result. Such is the general course of proceeding, without stopping to consider separate and special reports, or particular and special orders and instructions of the court; all the proceedings of the master being, of course, subject to the general superintending power and control of the court. The final report of the master, made in pursuance of the order of reference, may be considered as somewhat analogous to the award of an arbitrator at law, subject, however, to exceptions, and requiring the formal confirmation of the court. Notwithstanding the antiquity and importance of the office of master in chancery, it is understood that it has recently been wholly abolished in England, by act of Parliament. The duties which have heretofore been performed by masters, are to be performed by the master of the rolls

and the vice-chancellor, each to be assisted by two clerks, especially appointed for that purpose. This reference to the judicial modes of taking accounts in England, has been made, in the hope that it might afford some aid in ascertaining the appropriate powers and duties of auditors, in taking and stating accounts under our laws.

It is believed that the action of account was never much in use in this Commonwealth, and was practically superseded by the statute of 1817, which authorized the court to appoint auditors in common actions; and was wholly, and in terms, abolished by the Revised Statutes, ch. 118, § 43.

In the same section in which the action of account is abolished, it is provided that, "When the nature of an account is such, that it cannot be conveniently and properly adjusted and settled in an action of assumpsit, it may be done upon a bill in equity, to be brought in the Supreme Judicial Court, and the said court shall hear and determine the same, according to the course of proceedings in chancery. The course of proceeding in chancery, under this provision, would be, as we have seen, at once to refer the matter to a master in chancery, to take and state the account; before whom the whole matter would be heard and tried, and who would report the final result; and nothing would come before the court but the exceptions to the master's report.

Besides this provision for adjusting accounts by a bill in equity, provision is made in the revised statutes, for the appointment of auditors in suits at law, under which provision the question in the present case arises.

The appointment of auditors, therefore, rests upon the authority of the statute, and their powers and duties are prescribed by statute. The provisions of the revised statutes are much more full and explicit, and indicate the powers and duties of the auditors more clearly and definitely than those of the statute of 1817. By the revised statutes, ch. 96, it is provided as follows: —

Sect. 25. "Whenever a cause is at issue, and it shall appear that the trial will require an investigation of accounts, or an examination of vouchers by the jury, the court may appoint one or more auditors, to hear the parties, and examine their vouchers and evidence, and to state the accounts, and make report thereof to the court."

Sect. 27. "When there is more than one auditor, they

shall all meet and hear the cause, but a report by a majority of them shall be valid."

Sect. 28. "Witnesses may be summoned and compelled to attend and testify before the auditors, in the same manner as before arbitrators or referees.'

Sect. 30. "The report of the auditors, if there is no legal objection to it, may be used by either party, as evidence, on the trial, before the jury, but it may be impeached and disproved by other evidence, produced on the trial by either party." In the case of *Whitwell* v. *Willard*, (1 Met. 216), the question was, whether that was a case, within the statute, in which the court would appoint an auditor without consent of parties. Though all the court were of opinion that it would be highly useful to refer the case to an auditor, and that a report would much facilitate the trial, and though the terms of the statute are very general, that "whenever a cause is at issue," &c., yet, a majority of the court, looking at the particular terms of the act, put a construction upon it, which excluded from its provisions the case then under consideration, against the opinion of Mr. Justice Putnam; who held, that it was the intention of the legislature to authorize the court to appoint auditors in all cases, whether of contract or tort, where there is a necessity for such an examination of a great number of particulars, as could not be made by a jury, in the ordinary course of a trial, with any reasonable degree of certainty, as to the accuracy of results. The enlarged construction put upon the statute by Mr. Justice Putnam, would enable a court of law to avail itself of the aid of an auditor in cases involving an inquiry into particulars and details, in a manner similar to that in which a court of chancery is assisted by the services of a master.

But the inquiry in the present case is not in regard to the power of appointing an auditor, but in regard to the power of an auditor, properly appointed.

The name has probably occasioned some misapprehension, as to the power of an auditor. It has seemed to be supposed that an auditor, under the statute, was the same as the auditor in the action of account at common law. But they are the same only in name. The powers of the one are by no means the measure of the powers of the other. In *Fanning* v. *Chadwick*, (3 Pick. 424,) Mr. Justice Wilde, in giving the opinion of the court says, "It

has been argued, that the only remedy at law, if any, is by action of account, but this action is almost obsolete, even in England, and there seems to be no necessity for reviving it here. Justice may be administered in a form more simple, and less expensive, by an action of assumpsit, especially since the court is authorized to appoint auditors. Assumpsit has now all the advantages, without the disadvantages peculiar to an action of account." One of the disadvantages peculiar to an action of account, here referred to, it would seem, must have been the limited power of the auditor, which was removed by the enlarged power given under the statute. The above case was under the statute of 1817. The present case is under the revised statutes, the provisions of which are more full and complete, and which will now be more particularly considered.

The court are authorized to appoint one or more auditors. This enables the court to appoint such persons, and such a number of persons, as will be in every way safe and competent for the accomplishment of the business in hand, under the circumstances of each particular case. Whatever power the auditors may be held to possess, the court will see to it, that it shall be in every case intrusted to fit and competent hands, though their report is only *primâ facie* evidence, and not necessarily conclusive. The auditors are to hear the parties, and of course they are to hear them for the purpose of deciding such matters as may be heard.

But, in regard to what matters are the auditors to hear the parties, and to examine their vouchers and evidence? In the words of the statute, "They are to hear the parties;" in the most general terms, — they are to hear them as to every thing, without limit, and without restriction, bearing upon the matter which they have in charge, and the duty which they have to perform; that is, the taking and stating an account. They are to hear them upon every thing material in relation to the account; every thing proper to be considered in deciding upon the merits of the claims of the respective parties. They are not only to examine vouchers, but evidence in relation to all questions arising in the investigation of accounts.

The statute further provides, that when there is more than one auditor, they shall all meet and hear the cause, but a report by a majority of them shall be valid. Here they are to hear the cause; not merely examine vouchers,

and add up and subtract figures, but, hear the cause, the whole cause, — every thing appertaining to the matter of stating the account. "Witnesses may be summoned, and compelled to attend and testify before auditors, in the same manner as before arbitrators or referees."

This provision, for compelling witnesses to attend and testify before auditors in the same manner as before arbitrators and referees, gives to auditors the means of investigating accounts as fully, and in the same manner, as may be done by arbitrators and referees; and, providing the means, would seem to indicate that the auditors have the power, of making such examination. So far as respects the investigation of accounts, therefore, the power of auditors is as general and extensive as that of arbitrators and referees; though their report is only *primâ facie* evidence, and not conclusive and binding as an award.

The statute further provides, that "The report of the auditors, if there is no legal objection to it, may be used as evidence on the trial before the jury; but it may be impeached and disproved by other evidence, produced on the trial by either party." It is but *primâ facie* evidence, but it is *primâ facie* evidence, and may change the burden of proof.

But, of what is it evidence? The statute does not say it shall be evidence, in a restricted sense, as to the vouchers, or computations, merely, but shall be evidence in general terms, — evidence of every thing properly considered by the auditor, in stating the account, and of the true and just state of the account between the parties. Whatever the auditor finds necessary to do in the proper discharge of his appropriate duties, may be embraced in his report of his doings; and his report is evidence upon the trial before the jury. It has sometimes been said, when a question arises before an auditor, he should leave it open, to be decided by the court and jury, and state the account in different ways, so as to meet such decision as may be made. There doubtless may be some cases, in which it might be suitable for the auditor to make different statements of the account, to meet the ultimate decision of some question, but then there may be many cases, in which it would be exceedingly perplexing, if not wholly impracticable, for an auditor to state the account in such various ways as to meet the ultimate possible decision of the various questions raised in the case.

But it is sufficient that the statute does not require the auditor to make more than one statement of the accounts. He is to hear the parties, examine their vouchers and evidence, and state the accounts according to his view of the merits of the respective claims of the parties, upon a consideration of all the matters before him; and his report of his doings is evidence upon the trial. Such seems to be the general power of the auditor, as given by the statute, in the exercise of which, he is enabled to afford essential aid to the court in the administration of justice; and there is no reason why the court should destroy or impair his usefulness, by imposing limitations and restrictions upon his authority, which have not been imposed by the legislature.

These general views, as to the authority of an auditor, are sustained by the decisions, in particular cases, in this court. In *Bradley* v. *Clark*, (1 Cushing, 293,) it was decided, that an auditor may hear and decide the question, whether or not goods charged in account, were received and purchased on a barter account, "as this was directly within the range of inquiry, and of course within the scope of his authority."

In the case of *Jones* v. *Stevens*, (5 Met. 373,) the decission turned upon the particular facts and circumstances of that case, and does not throw any light upon the inquiry as to the general powers and duties of an auditor.

In the case of the *Commonwealth* v. *Cambridge*, (4 Met. 35,) it was held, that an auditor may hear and decide the question as to the value of labor which is the subject of an account referred to him.

In *Barnard, Administrator*, v. *Stevens*, (11 Met. 297,) it was held to be within the scope of the authority of an auditor, to hear and decide, whether or not certain notes were due by the defendant, to the plaintiff, and that his report was *primâ facie* evidence that the notes were due.

By a statute of Vermont, it is provided that the action of account may be sustained, among other things, on book account. It is further provided that, when judgment to account is rendered, "the court shall appoint one, or more, judicious and disinterested men to hear, examine, and adjust the accounts between the parties." The persons so appointed are called auditors.

In the case of *Stoddard* v. *Chapin*, (15 Verm. R. 443,)

it was decided, that "It is the duty of auditors to decide upon all questions of fact arising in the investigation of an account, and to deduce all inferences of fact which may be legitimately drawn from the evidence."

The same doctrine has been repeatedly and fully held in numerous decisions in the same court, though the report of the auditor is there binding and conclusive as an award of referees. So in *Brown* v. *Kimball*, (12 Verm. R. 617,) it was held that, "When the plaintiff seeks to recover for labor, the particular terms of the contract under which the labor was performed, and whether the plaintiff fulfilled, or voluntarily abandoned his contract, are questions of fact, to be conclusively determined by the auditor."

But it is not necessary further to extend the inquiry as to the general powers and duties of auditors.

The question now before the court, and to which alone the decision of the court applies, is a very simple one. The question is, Whether it was within the power of the auditor to hear and decide the question, whether Ray was the authorized agent of the defendant, to make the purchases, on his account, of the goods charged in account, against him, by the plaintiff.

It is very clear that, if the auditor had not power to settle that question, he had no power to do any thing. The auditor was to state the account between the parties; but whether or not there was any account between them, depended upon the question, Whether Ray was defendant's agent to make the purchases on his account. If Ray had no such authority, then the defendant had purchased no goods of the plaintiff, and there was no account between them. It was quite impossible, therefore, for the auditor to state the account between the parties, without deciding whether or not there was any account between them to be stated. It was, in fact, simply deciding, whether the defendant purchased the goods charged against him by the plaintiff, which was clearly within the scope of the authority of the auditor.

The exceptions overruled, and judgment on the verdict for the plaintiff.

Berkshire, ss., Sept. Term, 1851. — *Opinion delivered September,* 1852.

BERKSHIRE WOOLLEN COMPANY *v.* MOODY S. PROCTOR et al.

Liability of Innkeepers for the loss of Money by their Guests from the Rooms of the Inn — Custom.

Where R., the agent and servant of the plaintiff corporation, came to B. with a large number of witnesses, to take charge of a lawsuit in behalf of the corporation, bringing with him one thousand dollars to defray the expenses of the suit, and put up at defendant's inn as a guest, with several of the witnesses, for whose board he promised to be responsible to the defendants, but at an agreed price for board by the week, — the price to be greater if they did not stay a week, — and under said agreement staid at defendants' inn for eighteen days, it was *held*, that the relation of landlord and guest was established instantly upon his arrival at the inn, and his reception as a guest, and was not affected by his staying for a longer or shorter time, if he retained his character as a traveller; and the fact, that there was an agreed price for board, would not take away his character as a traveller and guest.

The agent, while at said inn, having had money of the plaintiffs, which had been delivered to him to be expended in their business, upon which he was then engaged, stolen from his locked trunk which was in his room in said inn, it was *held*, that the plaintiffs could maintain an action against the defendants, for the money so lost, and that the defendants were liable to the plaintiffs, as innkeepers.

During the eighteen days the plaintiffs' agent was at said inn, he had expended one half of the one thousand dollars. The remaining five hundred dollars was stolen from him. The defendants objected that this was not necessary, appropriate, or designed for the ordinary travelling and inn expenses of the said agent, and therefore they were not responsible; but it was *held*, that the defendants were liable therefor, the law holding the innkeeper responsible for the goods, chattels and money of his guest.

Proof of knowledge, as a matter of fact, is required to give effect to particular usages, which are not of so general a nature, as to furnish a presumption of knowledge.

There can be no legal presumption of knowledge, that every traveller who alights at an inn has knowledge of the particular usages of that particular inn, of which there is no notice in any way given to him.

THE facts of the case sufficiently appear in the opinion of the court, which was delivered by

FLETCHER, J. — This is an action on the case against the defendants, as innkeepers, for the alleged loss of five hundred dollars of the plaintiffs' money in the inn of the defendants, known as the Marlboro' Hotel, in the city of Boston. It was admitted that the defendants were innkeepers, and proprietors of said Marlboro' Hotel. It appears from the testimony, that about the fifteenth of October, 1849, Asa C. Russell, an agent and servant of the plaintiffs, went to Boston to take charge of their lawsuit, with some twenty-five witnesses. That said Russell took with him one thousand dollars of the plaintiffs' money, for the purpose of defraying the expenses of their said suit; that said Russell, with some of the plaintiffs' witnesses, put up at the Marlboro' Hotel; that he kept a part of the money in

his trunk, in his room, and took it out as he wanted it for daily use, to pay witnesses; that on November second, 1849, he counted his money, and found he then had just five hundred dollars, which he rolled up in a newspaper, and put the packet in the bottom of his trunk, under his clothes, and locked the trunk; that on the evening of November third, he found that the lock had been picked and the money had been taken from the trunk. He immediately gave notice to the defendants, and he with them made diligent search for the money; but it was never found. This money belonged to the plaintiffs, and was taken by said Russell, as their agent and servant, to pay the expenses of their suit. Some of the plaintiffs' witnesses boarded with the defendants at their said inn, and said Russell told the defendants that he would be responsible for the board of said witnesses. The said Russell agreed with the defendants for the price of his board by the week, and if he did not stay a week the price was to be greater than at the rate by the week. Said Russell testified that he thought he told one of the defendants that he was agent of the plaintiffs, but was not certain; that he did not inform the defendants that he had money with him, till after the loss. He also testified that the defendants called his attention to a safe in the office after the loss, but that he did not know whether he saw it before the loss, or not. He further testified that he thought it was a custom in Boston for innkeepers to have safes, but not a general custom for guests to deposit in them. He did not know that any body deposited packets in the Marlboro' Hotel.

He further testified, that it was his usual practice to lock the door of his room when he went out, and to leave the key in the door, but could not speak positively as to Friday, and Saturday, November 2d and 3d.

This witness, and others produced by the plaintiffs, testified to the practice of guests at the defendants' inn, of leaving keys in the doors of their lodging-rooms. To this the defendants objected, but it was admitted, with the instruction, that it was not to be considered by the jury, unless shown to be the usage of the house, and that known to the defendants.

Said Russell further testified, that the only regulations, of which he saw notice given, were contained in a printed notice posted in the house, which will be hereafter examined.

One of the plaintiffs' witnesses testified that one of the defendants stated, after the loss, that when he suspected that guests had large sums of money, he was in the habit of speaking to them about it, and regretted he had not done so to Russell.

The defendants, in their defence, offered to prove a general and uniform custom with innkeepers in Boston, to provide safes for the purpose of depositing therein large sums of money and other valuable things which their guests may have, and the custom of guests to deposit accordingly.

The court ruled that this evidence was inadmissible, and this ruling forms the ground of one of the defendants' exceptions.

But the court ruled that it was competent for the defendants to prove fully what was the custom of the defendants' hotel, and of their guests in this particular.

Thereupon both parties went at large into evidence as to this alleged custom at defendants' hotel, and of their guests.

Upon the whole evidence in the case the defendants contended, and requested the court to instruct the jury, that the plaintiffs were not the guests of the defendants, and that the defendants were not responsible to the plaintiffs for their money in the possession of Russell, though he might be the defendant's guest. But the court declined so to instruct the jury, and instructed them, that if Russell was agent and servant of the plaintiffs, and the guest of the defendants, as before stated, the defendants would be responsible to the plaintiffs for the loss of their said money, without notice, so far as the preceding objections were concerned.

The defendants also contended, that upon the foregoing facts, Russell was not a guest, but a boarder, and that therefore the liability of innkeepers for any losses sustained by Russell as agent and servant, or otherwise, did not attach to the defendants. But the court ruled, that the facts testified to by Russell, if believed, constituted him, in law, a guest, and not a boarder, and that the liabilities of innkeepers attached to the defendants for any loss sustained by him while in their inn, as aforesaid.

The defendants further contended, that in any event they were not liable for the loss in this case; that innkeepers are liable in case of loss, at the most, only for a

sum of money, necessary and appropriate, and designed for the ordinary expenses of the guest, including his expenses at the inn, and that in this case the defendants were not liable for this packet of five hundred dollars, inasmuch as the same was not necessary, appropriate, or designed for the ordinary travelling and inn expenses of said Russell; but was for the purpose of defraying the expenses of said lawsuit; and the defendants requested the court so to instruct the jury. But the court instructed the jury that, if the money in this case was kept by said Russell in his room, and was for the purpose of defraying the expenses of the business for which he was there in the lawsuit, and if the defendants had knowledge of his business as agent of the plaintiffs, and of their liabilities to their witnesses, and if the plaintiffs were responsible to the defendants for the board of their witnesses, though they did not in fact pay for the board of all, and the sum was a reasonable one for such business, then the defendants would not be relieved from their liability on account of the amount, or the purpose, for which the agent had said sum of money.

The defendants further contended, that though they might be primarily liable in law, they would be exonerated from all liability for the loss by showing that the loss was occasioned by the negligence of the guest himself, and upon this point requested the court to instruct the jury, that if they believed the custom of depositing in the safe prevailed in the defendants' hotel, as testified to by their witnesses, though no special notice thereof was given to said Russell, he being a guest in said hotel, was bound by said custom, and was in law presumed to know it, and that upon the facts disclosed, the jury were bound to infer that the loss was occasioned by the negligence of said Russell in keeping the packet in his trunk and giving no notice to the defendants that he had the same, and leaving his door with the key in the lock, as stated, and not by the negligence of the defendants. But the court declined so to instruct the jury, and instructed them that, if said Russell, the plaintiff's agent and servant, had knowledge of said custom of defendants' hotel, the plaintiffs would be bound by it; but if there was such a custom as was testified to by the defendants' witnesses, and said Russell had no knowledge of it, the plaintiffs would not be affected by it, unless he was wilfully ignorant of it.

The jury were also instructed, that the defendants would

not be responsible for the loss, if it was occasioned by the fault or the negligence of said Russell, the plaintiff's agent, and this matter was submitted to them, for their decision upon all the evidence introduced by the parties bearing upon this question.

A verdict having been found for the plaintiffs, the defendants moved to set it aside, and for a new trial, on the ground that the foregoing rulings and instructions of the court below were erroneous.

It is maintained, in behalf of the defendants, that the evidence offered by them, to show a general and uniform custom of the hotels in Boston, and their guests, to have money deposited in safes kept for that purpose, which was excluded at the trial, should have been admitted. This evidence is in depositions on file, which are made a part of the case, to be referred to in order to show what was the evidence offered. This testimony consists of four depositions, each deponent being the keeper of a hotel in Boston. Each witness states the custom of his own particular house and guests; but neither of them is able to state, or undertakes to state, any general and uniform custom upon the subject in question among the various hotels in Boston. The knowledge of these witnesses is confined to their own houses and customs, respectively, and does not extend to other houses, so as to enable them to speak of their own knowledge of any general or uniform custom. Proof of the usage of four houses, out of the whole number of public houses in Boston, would hardly be regarded as establishing any general usage. But the usage of these four houses does not appear to be uniform. Two of the witnesses testified that they had printed regulations posted up in the rooms of their respective houses, among other things, requiring their guests to leave their money and other valuable articles at the office, to be deposited for safety in their safe. The two other witnesses testified that they had printed regulations posted up in their respective houses, but that there was no regulation or notice in regard to depositing money, or other valuable articles, for safe keeping.

In two of the four houses, therefore, of whose custom evidence was particularly given, it was the custom to give particular notice to the guests to deposit their money, and in two of them there was no custom to give such notice. There was, therefore, in the custom of these four houses,

a very striking want of uniformity in a matter of vital importance. In regard to the custom of the guests in these houses, it appears, from the evidence, that some of them deposited their money, and this is all which does distinctly appear. The evidence wholly fails to establish the position, that there was any general, uniform custom of the guests, even in these four houses, to deposit their money in the safes. Independently, therefore, of the reason for the exclusion of this evidence, that, in determining the duties and liabilities of these defendants, the custom of other innkeepers and their guests was wholly irrelevant, the evidence was properly excluded, as being wholly incompetent, giving it its whole effect, to be submitted to the jury, to warrant them in finding the existence of any such general and uniform custom among innkeepers and their guests, as was set up by the defendants. Such a verdict, if found upon this evidence, could not be sustained. A usage to be adopted as a rule of law should be certain, and should be general in the branch of trade or business in regard to which it is set up, so as to authorize a presumption, that it is known to those dealing, or concerned in that branch of trade or business. A very eminent judge has said, "I am among those judges who think that usages among merchants should be very sparingly adopted, as rules of law, by courts of justice, as they are often founded in mere mistake, and more often in the want of enlarged and comprehensive views of the full bearing of principles." (2 Sumner, 377.)

The rights of parties must be determined by law, and not by any vague, and indeterminate, and partial usage of particular persons or places. A strict adherence to this principle is essential to a sound and consistent administration of justice. A departure from it would work great injustice. No man could know what were his rights or his duties, if they were to be determined by loose evidence of some particular indefinite and partial usage.

It is very improbable, from the nature of the case, that there could be any such general and uniform custom as the defendants attempted to prove. Individuals would, most likely, act according to their individual discretion, under the particular circumstances in which they were respectively placed.

It is very difficult to see how it could be known, whether guests having money did, or did not, generally or

uniformly, deposit it for safe keeping. The fact, that some deposited their money, might be readily known; but the fact that others, and perhaps the greatest number, having money, did not deposit it, might not be known.

But it is sufficient that the evidence offered in this case was incompetent to establish, or warrant the jury in finding the existence of any such general and uniform usage as was set up by the defendants. The defendants were permitted fully to prove what was the custom of their own house and guests. This was the only custom with which they were connected, and of which they could avail themselves.

For what purpose the defendants proposed to give evidence of the custom of other houses and their guests, was not stated, and does not appear. No purpose was stated. Surely the defendants could not take advantage of the custom of other houses, if it differed from their own, and if it was the same as their own, so far as it appears, it would have been wholly immaterial. The defendants having been permitted fully to prove the custom of their own house and guests, it does not appear that their rights were, or could be, in any way affected by the exclusion of the evidence as to the custom of other houses and their guests.

It is further maintained for the defendants, that Russell was not a guest, in the sense of the law, but a boarder. But Russell surely came to the defendants' inn as a wayfaring man and a traveller, and the defendants received him, as such wayfaring man and traveller, as a guest at their inn. Russell being thus received by the defendants, as their guest at their inn, the relation, with all the rights and liabilities of the relation of landlord and guest, was instantly established between them.

The length of time that a man is at an inn, makes no difference, whether he stays a week or a month, or longer, so that always, though not strictly *transiens*, he retains his character as a traveller. (Story on Bailm. § 477.)

The simple fact that Russell made an agreement, as to the price to be paid by him by the week, would not, upon any principle of law or reason, take away his character as a traveller and a guest. A guest for a single night might make a special contract as to the price to be paid for his lodging, and whether it were more or less than the usual price, would not affect his character as a guest.

The character of guest does not depend upon the payment of any particular price, but upon other facts. If an inhabitant of a place makes a special contract with an innkeeper there, for board at his inn, he is a boarder, and not a traveller or a guest, in the sense of the law. But Russell was a traveller, and put up at defendants' inn as a guest, was received by the defendants as a guest, and was, in the sense of the law, and in every sense, a guest.

Another ground of defence taken in behalf of the defendants is, that this action cannot be maintained, because the plaintiffs, being a corporation, were not, and could not be, in the nature of things, the guest of the defendants; and that an innkeeper is liable only for the goods of his guest, and that, therefore, the defendants are not liable for the money of the plaintiffs, as they were not actually nor constructively the guests of the defendants.

But this reasoning cannot prevail. Russell was the defendants' guest, and he was the agent and servant of the plaintiffs; and the money which was lost, and for which this suit was brought, was the plaintiffs' money, in the possession of Russell, delivered to him by the plaintiffs, as their servant and agent, to be expended in their business. This action, therefore, can well be maintained upon the well settled principle of law, that if a servant is robbed of his master's money or goods, the master may maintain the action against the innkeeper in whose house the loss was sustained.

This point was directly settled in *Beedle* v. *Morris*, (Yelverton, R. 162, and notes and cases cited.) In that case it was said by the court, "And, moreover, it is not material whether he was his servant, or not, for if it was his friend by whom the party sent the money, who is robbed in the inn, the true owner shall have the action." The doctrine is thus stated in Bacon: —

"If a man's servant, travelling on his master's business, comes to an inn with his master's horse, which is there stolen, the master may have an action against the host, because the absolute property is in him. So if A. sends money by his friend, and he is robbed in his inn, A. shall have the action." (Bacon's Abridg. Inns and Innkeepers, C. 5.)

Such was also adjudged to be the law in *Towson* v. *The Havre De Grace Bank*, (6 Har. & John. 47.) In

this case, after stating the position, that if A. sends his money by his friend, who is robbed in the inn at which he is a guest, A. shall have the action, the court say, "And there is no reason why it should not be so, the innkeeper being chargeable, not on the ground that he entertains the owner of the money, or other goods, but because he receives, no matter by whom paid, a compensation for the risk. See also, *Bennett* v. *Mellor*, (5 T. R. 273); also *Beedle* v. *Morris*, (Cro. Jac. 224.)

The case of *Mason* v. *Thompson*, (9 Pick. 280,) goes still further. In that case, G. hired the horse, chaise and harness of the plaintiff, and drove the same to Boston, where she stopped, as a visitor, with a friend, and sent the horse, chaise and harness to the stable of the defendant, who was an innkeeper, to be kept during her visit. After four days she sent for the property, and found that a part of it had been stolen, for which the innkeeper was held liable to the plaintiff, who was the owner. It was urged for the defendant, that neither G. nor the plaintiff was the defendant's guest, as neither of them had diet or lodging at the defendant's inn. But the court said it is clearly settled, that to constitute a guest in legal contemplation, it is not essential that he should be a lodger, or have any refreshment, at the inn. If he leaves his horse there, the innkeeper is chargeable on account of the benefit he is to receive from the keeping of the horse. Upon this point the case of *York* v. *Greenough*, (2 Ld. Raym. 866.) was relied on. In *Grinnell* v. *Cook*, (6 Hill, 485,) the case of *Mason* v. *Thompson* was commented on, and that part of it which held, "That to constitute a guest in legal contemplation, it is not essential that he should be a lodger, or have any refreshment at the inn," was controverted, as not warranted upon principle, or by adjudged cases. Bronson, J., in giving the opinion of the court says, "But when, as in Mason against Thompson, the owner has never been at the inn, and never intends to go there, as a guest, it seems to me little short of downright absurdity to say that, in legal contemplation, he is a guest."

But this particular point is not material in the present case, as in this case Russell was the defendant's guest. Though it be settled that the owner of the goods or money may have an action, it may also be, that an action could be maintained either by the servant or master.

Another ground of defence is, that the defendants are

not liable for the loss in this case; as innkeepers are liable for such sums, only, as are necessary and designed for the ordinary travelling expenses of guests, and for no more. Such was the doctrine held by this court in the case of *Jordan* v. *The Boston & Fall River Railroad*, (5 Cush. 69,) in regard to the liability of a carrier of passengers for baggage. Formerly, it was held that a carrier of passengers was not answerable for baggage at all, unless a distinct price was paid for it; but it is now held, from the usual course of business, that a contract to carry the ordinary baggage of the passenger, is included in the principal contract in relation to the passenger, and the price paid for fare is considered as including a compensation for carrying the baggage; so that a carrier is answeraable for the loss of baggage, although there was no particular, separate agreement concerning it. But this implied undertaking on a carrier of passengers, does not extend beyond ordinary baggage, or such things as a traveller usually carries with him for his personal convenience on the journey, including such an amount of money as, under the circumstances, may be necessary, and is designed for the payment of travelling expenses. A common carrier of passengers is not responsible, unless by a special contract, for goods and chattels, or money, not properly belonging to the baggage of the passenger. *Jordan* v. *The Boston & Fall River Railroad*, (5 Cush. 69.)

Common carriers of goods are responsible for any amount of goods and money, which may be intrusted to them, when the carriage of money is within the scope of their employment and business. The responsibility of innkeepers for the safety of the goods and chattels and money of their guests, is founded on the great principle of public utility, and is not restricted to any particular or limited amount of goods or money.

The law on this subject is very clearly and suscinctly stated by Chancellor Kent, as follows: "The responsibility of the innkeeper extends to all his servants and domestics, and to all the moveable goods and chattels and money of his guest, which are placed within the inn." (2 Kent, Com. 593.)

The liability of an innkeeper for the loss of the goods of his guest being founded, both by the civil and common law, upon the principle of public utility, and the safety

and security of the guest, there can be no distinction, in this respect, between the goods and money. *Kent* v. *Shuckard*, (2 Barn. & Adol. 803); *Armistead* v. *White*, (6 Eng. L. & E. R. 349); *Quinton* v. *Courtney*, (1 Hayw. N. C. R. 40.)

The principle for which the defendants contend, that innkeepers are liable for such sums only, as are necessary and designed for the ordinary travelling expenses of the guest, is unsupported by authority, and wholly inconsistent with the principle upon which the liability of an innkeeper rests.

The reasoning, both of the civil and common law, by which the doctrine of the liability of innkeepers, without proof of fraud or negligence, is maintained is, that travellers are obliged to rely, almost entirely, on the good faith of innkeepers; and it would be almost impossible for them, in any given case, to make out proof of fraud or negligence in the landlord; and that, therefore, the public good and the safety of travellers require that innholders should be held responsible for the safe keeping of the goods of their guests.

This reasoning maintains the liability of the innkeeper for the money of the guest, quite as strongly as his liability for goods and chattels, and it would be clearly inconsistent with the general principle upon which the liability is founded, to hold that the defendants were not responsible for the money lost in the present case. 2 Kent, Com. 592–594; Story on Bailm. 305–308; *Sneider* v. *Geiss*, (1 Yeates, 34.)

The defendants further contended that, although they might be, primarily, liable in law, yet they would be exonerated from all liability, by showing that the loss was occasioned by the negligence of the guest himself, and upon this point requested the court to instruct the jury, "That if they believed that the custom of depositing in the safe prevailed in the defendants' hotel, as testified to by their clerks and servants, although no special notice thereof was given to said Russell, and, if contrary to said custom, said Russell retained this packet in his possession, keeping it in his trunk, gave no notice to the defendants that he had the same, and left his door with the key in the lock, in the manner stated, and took no other precaution to secure his room, (although the jury should believe that, in this respect, he followed the practice of other

guests, who were not proved to have kept money in their rooms,) said Russell, being a guest at said hotel, was bound by said custom, and was, in law, presumed to know it; and that, upon these facts, the jury were bound to infer that the loss was occasioned by the negligence of said Russell, and not of the defendants. But the court declined so to instruct the jury, and instructed them, if said Russell, the agent, had knowledge of said custom of the hotel, the plaintiffs would be bound by it, and if there were such a custom as testified to by the witnesses for the defendants, and said Russell had no knowledge of it, the plaintiffs would not be affected by it, unless he was wilfully ignorant of it.

The jury were also instructed, that the defendants would not be responsible for the loss, if it was occasioned by the fault or negligence of Russell, the plaintiffs' said agent, and this matter was submitted to them for decision, upon the evidence introduced by the parties bearing upon the question.

The defendants' counsel objects to the instruction, — "That if there were such a custom, as testified to by the witnesses for the defendants, and said Russell had no knowledge of it, the plaintiffs would not be affected by it, unless he was wilfully ignorant of it." Contending that said Russell was bound in law to know the custom, and was in law presumed to know it, and that the jury should have been so instructed.

The evidence of the custom at the defendants' hotel is contained in the following question and answer, in the deposition of the defendants' clerk.

4th Interrogatory. Is there not a custom amongst those stopping at hotels, to leave money or valuables at the bar, or with the keeper of the house or his clerks? State particularly as to this custom, if it exists, and how general it is.

Answer. It exists at the Marlboro' Hotel, I know, and to some extent in other hotels.

Nothing particular, or specific, in regard to the custom is stated, nor whether it was the custom of all, or what proportion of the defendants' guests having money, to deposit it for safe keeping. In the printed regulations, posted up at the defendants' inn, the Marlboro' Hotel, and which purported to give notice to the guests of the regulations and usages of the house, there was not the slightest

notice or intimation to the guests to leave their money at the bar, or with the keepers of the house, or their clerks, or that such was the custom of the house; nor did it appear that any such notice was given in any way to said Russell. There surely can be no legal inference or presumption of law, that Russell had knowledge of this particular usage of the defendants' house. Upon this point the case of *Stevens* v. *Reeves*, (9 Pick. 198,) is conclusive. In that case it appeared that it was the usage in a woollen factory in Andover, and some other neighboring factories, that no person employed should leave their service without giving a fortnight's notice of his intention to quit. A weaver, who did not know of this usage, worked in the factory and left without giving any previous notice. It was held, that as this was a particular, private usage, to make it binding on the party, it must appear, as a matter of fact, that he knew of the usage when he entered on the work, or before he left it.

Proof of knowledge, as a matter of fact, is required in order to give effect to any and all particular usages, not of so general a nature as to furnish a presumption of knowledge. There certainly can be no legal presumption that every traveller who alights at an inn has knowledge of the particular usages of that particular inn of which there is no notice in any way given to him.

Whether Russell had any knowledge of the alleged custom of the defendants' inn for the guests to deposit their money, was properly submitted to the jury as a question of fact, to be decided by them upon the evidence in the case; and the instructions of the court, as to the effect of such knowledge on the rights of the plaintiffs, were certainly sufficiently favorable to the defendants.

All the exceptions are overruled, and judgment must be rendered on the verdict for the plaintiffs.

Supreme Court of Pennsylvania, Pittsburg, Oct. 7, 1852.

LOCKWOOD et al. *v.* LASHELL et al.

Collision — Duties of Steamboats when approaching each other.

THIS was an action on the case by the owners of the steamboat Caroline, against the owners of the steamboat Consignee, to recover damages sustained by a collision of the vessels.

The collision occurred on the night of the 9th of March, 1849, on the Ohio, about one hundred yards from the Virginia shore; the river being four hundred yards wide, and the water at a stage from eighteen to twenty feet deep. The Caroline, a small stern-wheel boat, was ascending at a rate of three or three and a half miles an hour. The Consignee, a large side-wheel St. Louis boat, was descending at a speed of from ten to fifteen miles an hour. The Consignee, when the vessels first came in sight of each other, was descending the middle of the river. On the trial, it was claimed by the plaintiffs, that when the vessels came in sight of each other, the Caroline was in the act of crossing, had passed the middle of the river, and was nearing the Virginia shore; and that, under these circumstances, it was the duty of the Consignee to have ported her helm, and passed on the larboard or Ohio side, where there was abundance of room for passage; but that, on the contrary, her course was changed towards the Virginia shore, and the vessels thus came in collision.

On the other hand, the defendants claimed, that when the Caroline was discovered, she was ascending the Ohio shore, and that as the Consignee approached, the course of the Caroline was suddenly changed across the river, so as to pass improperly under the bows of the Consignee.

The actual place of the collision was designated by the anchor of the Caroline, which, falling from her bow at the time of the stroke, was found one hundred yards from the Virginia shore.

Under the charge of the court, the case turned first upon the position of the Caroline when the Consignee came in sight; for if, as the defendants claimed the fact to be, she was ascending on the Ohio side, and her course was changed so as to pass under the bows of the descending boat, the Judge charged that it was a "false move, and she cannot recover."

"If the Caroline made the move which the defendants' witnesses think she did, it was I think a false move, and she cannot recover."— *Judge Lowrie's Charge.*

But if she did not make that move, and was in the position claimed by the plaintiffs, her helm ported and nearing the Virginia shore, then the case turns upon the correctness of the charge, that it was the duty of the Consignee, under such circumstances, "to port her helm," or pass "on the larboard."

The jury have found that the Caroline did not "make the false move which the defendants think she did;" and the question is therefore reduced to the simple inquiry, whether the court erred in the law applicable to the circumstances of the case, as presented by the proof and finding of the jury.

Lewis, J. — This, in the court below, was an action on the case brought by the owners of the steamboat Caroline, against the owners of the steamboat Consignee, to recover damages occasioned by a collision. The injury occurred on the 9th of March, 1849, on the Ohio River, in the State of Virginia, a short distance above Steubenville, Ohio. The Caroline was a small stern-wheel boat, and was ascending the river. The Consignee was a large side-wheel St. Louis boat, and was descending.

The owners of the Caroline obtained a verdict and judgment in their favor, for the sum of four thousand dollars damages.

To reverse this judgment, this writ of error was taken out by the owners of the Consignee.

The errors assigned are three in number; but they refer to different forms of expressing the same principle, and may be disposed of by the decision of a single question: Is it a rule of navigation, recognised by law, that steam vessels, meeting each other in a clear river, or open sea, shall each pass to the right, in case of danger of collision? In husbandry, in the mechanical arts, and in the various other pursuits of life, every one is required to exercise his calling according to the most approved lights and rules of the art or science which he professes to practise. This rule is founded upon principles of natural justice, and sustained by the highest considerations of public policy. A steady adherence to it stimulates the advances of useful improvement, and promotes the comfort and security of all. Why should the pursuit of navigation be exempt from its operation? Why should those who are entrusted, more than any other class, with the care of life and property, be exempt from a rule so indispensable to the safety of both? No just reason can be assigned why this great art, sustaining as it does the commercial interests of the world, should be placed in a state of outlawry. Those engaged in it are assuredly bound by the rules which are the result of the practical experience and wisdom of navigators, as strongly as others are required to exercise ordinary skill and care in their respective occupations.

Among the nautical rules applicable to the navigation of sailing vessels, are the following: A vessel that has the wind free, or sailing before or with the wind, must get out of the way of the vessel that is close-hauled, or sailing against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. So when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right. The same rule governs vessels sailing on the wind and approaching each other, when it is doubtful which is to the windward. These principles are sustained by abundant authority. 1 Wm. Rob. 483; 2 Ib. 189, 196; 3 Hagg. 316; Ib. 320; Ib. 327; 2 Dodson, 86; 5 Rob. 345; 3 C. & P. 528; 9 Ib. 601; 12 Moore, 148; 3 Kent, Comm. 230; 10 How. U. S. R. 581. The reason why the vessel on the starboard tack has a right to keep her course, is because her helm is already put to port, in accordance with what has been called the "Golden Rule" of navigation; and the reason why "the one on the larboard tack must give way," is because the further progress of her course would be a violation of that rule. And when it is said, that if two vessels are approaching each other, both having the wind free, they must each "pass to the right," the duty of porting the helm is imposed upon both, because both have the power of "readily controlling their movements." As "the reason of the law is the life of the law," it necessarily follows that the like obligation rests upon steamboats, because they possess entire control over their movements. They are, therefore, required to do whatever sailing vessels, going free or with a fair wind, would be required to do under similar circumstances. There is this difference, however, between steamers and sailing vessels, that the former, having greater control over their movements than the latter, even with a fair wind, are held to a stricter rule of responsibility. In the case of *Lowrey* v. *The Steamboat Portland*, in the U. S. District Court of Massachusetts, in January, 1839, it was certified by experienced navigators, and adjudged by the court, as the rule on the subject, that "When two vessels approach each other, both having a free or fair wind, each vessel passes to the right; and that a steamer was considered as always sailing with a fair wind, and is bound

to do whatever a sailing vessel going free or with a fair wind would be bound to do under similar circumstances." 3 Kent, Comm. 231, note *d.* Nearly two years afterwards, on the 30th of October, 1840, the experienced navigators of Trinity House, (a corporation of pilots, which has existed under different charters ever since the reign of Henry VIII.) "recognised" the existence of the same rules of navigation. So far from professing to establish for the first time even the application of the old rule to steamers, they expressly declare, that "On communication with the Lords Commissioners of the Admiralty, the Elder Brethren find it has been already adopted, in respect to steam vessels in Her Majesty's service." These rules of navigation have been frequently recognised in admiralty cases in the district courts, and in 1850, they were strongly enforced by the Supreme Court of the United States. 10 How. 581. And it is there declared to be the obvious duty of the courts to "apply them strictly in all cases of collision, unless where a clear exception is established by the party seeking to excuse itself for the departure." Ib. It is undoubtedly true, that no vessel, especially a steamer, should unnecessarily incur the probability of a collision by a pertinacious adherence to the particular rule in question here. 1 W. Rob. 157. Even the Trinity House regulations acknowledge the necessity of occasional departures from it, when they declare that steam vessels should "give way to sailing vessels on a wind on either tack." The expression, "giving way," does not mean the putting the helm to port under all circumstances; but porting, or starboarding the helm, as the exigencies may require. *The Gazelle*, (10 Jur. 1066); 2 W. Rob. 270; 8 Jur. 320; 3 Notes of Cases, 36. When either vessel is in such a condition as to render it manifest that porting the helm would produce a collision, the vessel on her right course is justified, in spite of the rule, in putting the helm to starboard. 4 Moore, 314. We subscribe to the remark of Dr. Lushington, that "There must be exceptions to the rule, implied by common sense." *The Rose*, (Adm. Hill Term, 1843.)

But when the court instructed the jury correctly in regard to the general rule, it is not error that all the exceptions to it were not stated. The party who claims that his case is an exception, must show in the evidence the particular circumstances which take his case out of the general rule. It is not to be expected that the court below is to

deliver a treatise upon navigation; or that this court can reverse upon an abstraction. Experience has shown that instructions given to the jury upon principles not arising in the case, only tend to divert their attention from the real question of the cause. The learned judge before whom this case was tried, was perfectly correct in confining himself to the particular exceptions relied upon, and presented by the evidence. From the paper book, it would seem that the defendants below insisted that "When the Caroline was discovered, she was ascending the Ohio shore, and that as the Consignee approached, the course of the Caroline was suddenly changed across the river, so as to pass improperly under the bows of the Consignee."

In reference to this ground of defence, the Judge instructed the jury that "If the Caroline made the move which the defendants' witnesses think she did, it was, I think, a false move, and she cannot recover; for her false move may have led to a false move of the Consignee." This question of fact was submitted to the jury, and they have found it against the plaintiff in error. The error, if there be one, lies with them, and their decision is not the subject of revision on a writ of error. The instructions given were perfectly correct.

Judgment affirmed.

Shaler and *Stanton*, for the Caroline.

A. W. Loomis and *Gilmore*, for the Consignee.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Massachusetts — Berkshire, September Term, 1852.

Action, surviving of. Action on the case by an administrator of a deceased wife, under statute of 1841, to recover damages for injuries to the person of the intestate, by a collision of a train of cars with the carriage of the intestate. The deceased lived fifteen hours after the collision in a partially insensible state, giving occasional evidences of recognition of what was passing around her. The evidence of her attending physicians was somewhat conflicting, as to the fact whether motions made by her were spasmodic or intelligent. *Held*, by the court, SHAW, C. J.: — The right of action in the representative of the party intestate, must depend upon the simple question between life and death. If the intestate had a continuance of life after the accident, the right of action accrued to her, and survived to her representative. If death happens instantly, then there is no *punctum temporis*, for the vesting or accruing of a right of action. The survivorship of the action does not depend upon the fact, that there was intelligent

power in the person injured to commence an action. The familiar principle in the law of descents, as to survivorship, is applicable; if there is a distinct period intervening between the death of a father and his son, the estate will vest in the son and pass to his heirs. The case of *Mann, Adm'r, and Kearney, Adm'x*, v. *The Boston & Worcester Railroad*, (cited in Law Rep., May, 1852,) qualified and explained, and the principle sustained. In that case there was no period of continued life after the accident, as found by the jury. — *Hollenbeck, Adm'r*, v. *Berkshire Railroad Company.*

Briggs and Taft, for plaintiff; Porter and Chamberlain, for defendants.

Contract — Partial Performance — Rule of Damages. Action upon a sealed agreement to build a dam, to recover the last instalment due by the terms of the agreement. Defence was, that the plaintiff had not fulfilled his contract, and had not performed the work in the manner prescribed in the agreement; and that it was specially set forth in the agreement that the last instalment should "be paid upon the full completion of the work;" and nothing could be recovered under the common courts, "*quantum meruit*," or "*quantum valebant.*" The court below ruled, that the plaintiff might recover for work, labor and materials, furnished the defendant, under the contract, if the defendant had either accepted the same, or the work, &c. was of such a character as to be inseparably joined to the realty, if the plaintiff had performed the same in good faith, and that the jury might deduct from the contract price so much as the dam was less worth, than it would have been if the contract had been fully performed.

Held, that this ruling was entirely correct, and sustained by the current of authorities in Massachusetts, as appeared in *Snow* v. *Inhabitants of Ware*, (13 Met. 42.) Exceptions overruled. — *Gleason* v. *Smith et al.*

Bowerman, for plaintiff; Dawes, for defendant.

Disseisin — Adverse Possession — Estoppel — Writ of Review. The action reviewed was a writ of entry to recover lands in Williamstown. The demandant claimed title by a deed from H. to B., executed in 1826 — an assignment upon B.'s insolvency, and deed from the assignor to demandant, dated in 1849. The tenant (H.) claimed that he had ever remained in possession of the premises, from 1826 to present time; that the possession was adverse, of exclusive character, and revested the title in himself, notwithstanding his deed to B., and that, therefore, at the time of the assignee's deed, the insolvent (B.) was disseisin. At the trial the judge (Cushing) ruled, 1. That a grantor may acquire a title against his own grantee, by establishing a legal ouster or disseisin; that a re-entry of the demandant in 1849 would not avail against the existing disseisin of B. To this ruling defendant in review excepted.

Held — the new title may be shown in any mode of legally acquiring title. A grantor, by twenty years of adverse possession, may acquire a title against his own grantee by deed. He is not estopped from setting up such title. No estoppel arises from the fact, that the deed contained covenants of warranty. Exceptions overruled. — *Hendergas in Review* v. *Stearns.*

Porter, for plaintiff in review; Robinson & Son, for defendant.

Error, Writ of — What may be assigned for Error, &c. Error assigned was, 1. It was an action of assumpsit, and the judgment, upon the default of the original defendant, was entered up, and execution issued upon a bill of particulars filed, which contained items, not provable under the common counts of the writ. 2. The officer charged for service five dollars, for extra expenses, in keeping the property attached upon the writ, and no affidavit was filed as a voucher of the same. 3. There were taxed in the

bill of costs fifty cents for a special declaration; but the court *held*, that the original judgment was erroneous in all the items, which were not provable in assumpsit, and to that extent is to be reversed, and sustained for the residue. There is no rule which prescribes that the verification of the extra charges of the officer should be filed, and, as the party always has the privilege of a notice of the taxation of costs, the presumption in all cases must be, that the clerk acts upon competent proof before him. — *McCarty in Error* v. *Hammond et al.*

Sumner, for plaintiff in error; Palmer, for defendant in error.

Evidence — Declaration of a Party. Action against a surgeon and physician for alleged malpractice in the setting of a fractured thigh-bone. The defendant, in the course of the trial, (to rebut the ground taken by plaintiff, of his, the defendant's ignorance of the true point of fracture, and the applicability of a certain instrument,) offered evidence of his declarations, previous to the operation performed and the adjustment of the instrument, explaining the operation of the instrument, and its mode of creating the effect intended. These declarations were made in the presence of the plaintiff, but he made no reply to them. It was strongly urged by plaintiff, that these declarations were inadmissible, because they were the statements of a party in whose behalf they were offered, not accompanied by any assent of the plaintiff, and being no part of the *res gestæ;* citing *Commonwealth* v. *Kinney*, (12 Met. 235.) To the admission of the evidence in the court below the plaintiff excepted. Verdict for defendant.

Held, that the declarations appear to have been properly admitted. It is frequently very difficult to decide fully upon the bearing of testimony, and as to the purposes for which it was offered at the trial, in exceptions to the admission of the same. In this case it may well be supposed that the declarations might have had an important bearing upon the issues. Exceptions overruled. — *Moody* v *Sabin*.

Thayer, for plaintiff; Richwell, for defendant.

Evidence — Declarations. Action of trespass *quare clausum*. Plea, the general issue. The only question in the case was the true location of the south line of premises adjoining the *locus in quo*. It appeared that the plaintiff, in 1835, conveyed these premises to one Woodworth, through whom they came to the defendant. In 1837, one Smith was about to erect a new fence on the south part of these premises, (he owning the lands adjoining on the south) in place of an old brush fence, which was claimed in the case by the defendant, as the true boundary. The plaintiff told Smith (not in the presence of the defendant) "not to erect his fence there, as it was not the true line." Smith was a witness for defendant, but all the matters in relation to the new fence, and plaintiff's declarations, was elicited by the plaintiff's counsel in cross-examination. The defendant objected to the declarations, but they were admitted by the presiding judge, for the sole purpose of rebutting the inference of acquiescence in the erection of the new fence, as an acknowledgment that it was the true boundary.

Held, that the evidence was properly admitted. The judge who presided at the trial, doubtless, decided correctly upon the bearing of the testimony upon the points at issue. Exceptions overruled. — *Parks* v. *Whiting*.

Emerson, for plaintiff; Sumner, for defendant.

Evidence — Partnership — Pleading — Action of Assumpsit. The bill of particulars filed with the writ set forth charges against the defendant solely. At the trial the plaintiff sustained his bill of particulars by his book of original charges, by which it appeared that the charges were

made against the defendant and one Graves, who was not named in the action. The court below admitted the evidence, and a verdict was returned for plaintiff. To the ruling the defendant excepted.

Held, that the ruling was entirely correct. It has long been settled, that when two are jointly liable on a contract, one may be sued, and the remedy of the party against whom the action is brought, is a plea in abatement. Here there was no such plea, and the exceptions are overruled. — *Scott* v. *Shears*.

Wolcott, for plaintiff; Palmer, for defendant.

Grant, Construction of — Boundaries. Action against a town for alleged defect in a bridge across the Farmington River, which divides the towns of Sandisfield on the west, and Tolland, the defendant town, on the east. The accident was on the east half of the bridge. Defendants denied that any portion of the bridge was in Tolland, contending that the east bank of the river is the west bound of the town. The language of the grant, incorporating Tolland, is as follows (in part): "Thence to a hemlock tree in the west branch of Farmington River, and is the north-west corner of said tract, thence bounding on said west branch of the river as it runs to a great hemlock tree at the colony line, being the south-west corner of said tract. Both hemlock trees were on the east side of the river. The plaintiff contended, that the line must be extended "*ad medium filum aquæ.*" The court below refused to thus instruct the jury, and exceptions were taken by the plaintiff.

Held, that the construction contended for by the plaintiff was correct. It is agreed, that if this were a deed *inter partes*, the true bound would be the thread of the stream. The bank of the stream is always changing. The rule of "*medium filum*" is the rule adopted among nations and municipalities. *Inhabitants of Ipswich, Pet'rs*, (13 Pick. 431.) Exceptions sustained. — *Cold Spring Iron Works* v. *Tolland*.

Wilcox, for plaintiff; Bates, for defendant.

Grant, Construction of — Damages for Flowing, &c. A. conveyed to B. a right to construct certain ditches or sluice-ways in his (A.'s) land, and build a dam across the river adjacent at a height, "not so high as to raise dead water above the mouth of the ditch." B. constructed his dam, and did not exceed the height limited, but in so doing overflowed a portion of A 's lands. A. brought his complaint for flowing, and B. contended that his grant authorized him to flow the lands of A., without the payment of damages, and that the right to thus flow the lands was incident to the grant, *ex vi termini*, and entered into the consideration. The court below held the complaint could be sustained, and the defendant excepted.

Held, that the grantee of the right to erect the dam acquired thereby no right to flow the lands of the grantor, without the payment of damages. A grant is not thus to be extended beyond the purpose for which it was made. Exceptions overruled. — *Estes* v. *Wells*.

Dawes, for complainant; Thayer, for respondent.

Usury — Evidence to sustain — Construction of Statute. Action of debt to recover threefold unlawful interest paid upon a promissory note. The plea was the general issue. The plaintiff was offered as a witness, which was objected to, but the court below overruled the objection, and a verdict was rendered for the plaintiff. Exceptions were taken to the above ruling, and it was contended that the fourth section of the statute (Rev. Stat. ch. 35) only applies to cases where the relation of debtor and creditor exists, and does not apply to the case of an action brought to recover a penalty; and that it only applies to the case of a defence made by a debtor, where the usury has not been paid.

But *held*, that the plaintiff may be a witness. The evidence may be

offered by both parties; by the debtor as a partial defence, and after the contract has been performed, and the usury paid, both parties are admitted as witnesses. — *Gifford* v. *Whitcourt.*

Dawes, for plaintiff; Robinson, for defendant.

New York Court of Appeals, October 22, 1852.

Present, RUGGLES, Chief Judge; GARDINER, JEWETT, JOHNSON, EDMONDS, WATSON, MORSE, and WELLES, Judges.

[From the New York Evening Post; corrected for the Law Reporter by Mr. Justice EDMONDS, of the Court of Appeals.]

Aliens — Conveyances to — Devise to Alien Trustees — Explanatory Statute. The act of 1798, which enacted that every conveyance thereafter made to an alien, of lands in this state, vested the estate granted in the alien, and enabled his heirs to hold the same, although such heirs were also aliens: and where, by the statute, it was also enacted that the alien should hold the same to his heirs and assignees forever, any plea of alienism to the contrary, notwithstanding, the descent is not limited to heirs who are not aliens. — *Duke of Cumberland* v. *Graves.*

The act of 1819, explaining the act of 1798, is in conformity with its true judicial construction, and operates upon the title to the land in dispute by way of legislative construction of the previous statute, and removes whatever doubt may have existed as to the validity of the devise to alien trustees. Opinion by RUGGLES, C. J. — *Ib.*

APPEAL — *What is the Subject of Appeal.* Where the exception in the case is to the whole of the judge's charge, and where some parts of the charge are correct, the exception cannot avail the party taking it. So, too, as to the refusal to charge. Where the exception is to the whole refusal, and where some part of the refusal is right, the exception must fail. — *Davenport* v. *Covert.*

This rule must be adhered to, because, under the code, nothing but an "actual determination" in the court below, can be revived on an appeal; and, unless the attention of the court below be called at the time to the point ruled or sought to have ruled, the cause may be disposed of on appeal, on grounds which the court below did not actually determine. Opinions by WATSON, JEWETT and EDMONDS, JJ. — *Ib.*

A motion before a surrogate for leave to dismiss an application, being denied there, the decision of the Supreme Court, affirming that order, is not applicable to this court, because not a final determination. — *Tompkins* v. *Salisse.*

An order or decree which reserves further directions, until the coming in of a report thereafter to be made, is not a final determination of the cause, and is not, therefore, appealable to this court. — *Wells* v. *Gibson et al.*

The decision of the court below awarding costs against executors, and also making an extra allowance for costs, being a matter in the discretion of that court, cannot be reviewed in this court on appeal. — *Fort et ux.* v. *Gooding's Executors.*

A motion to open biddings on a judicial sale is addressed to the discretion of the court below, and a decision upon it is not appealable to this court. — *Lord* v. *Peister.*

The decision of the Supreme Court, on the appeal from the county court, as to locating a toll-gate, is final. — *McAlister* v. *Albion Plank-road Company.*

Where no exceptions to any ruling of the court were taken on the trial below, there is no question of law to be considered in this court, and therefore the case cannot be reviewed here. Opinion by WATSON, J. — *Rich* v *Kimberly.*

Where no question of law is raised by the return to the appeal, and questions of fact alone are presented for the consideration of the court, the judgment of the court below will be affirmed. Opinions by GARDINER and WATSON, JJ. — *Kendall* v. *Harris.*

It appearing by the return to the appeal, that no question of law was raised in the court below, and no exception taken to any ruling or decision of the judge or court on the trial, and it not appearing, therefore, from the record, whether the question discussed on the argument, namely, whether the common school law was unconstitutional by reason of its having been submitted to the people for approval or rejection, had been actually raised and finally determined in the court below, this court cannot entertain it, on appeal. Opinions by JEWETT and WELLES, JJ. — *Barto* v. *Himrod.*

Practice in Cases of Appeal. In all cases of appeal from a decision on a motion to set aside the report of the referees, there must be a statement of facts prepared and incorporated into the records, by the court below, showing to this court how the facts were found and understood in that court. In this case, the record contains merely a special report of the referee, showing what evidence was given before him, and for that reason the appeal is dismissed with costs. Opinion by EDMONDS, J. — *Geer* v. *Wetmore.*

A voluntary dismissal or abandonment of an appeal, is no bar to a further appeal by the same party, within the time prescribed by the statute. — *Crafts* v. *Ives.*

Arrest on Final Process — Pleadings. In order to justify the arrest of a defendant, under the code, on final process after judgment, it is not necessary that there should be any averment in the pleadings of the defendant's liability to be arrested. It is enough, to justify such arrest on final process, that the case is one in which the defendant may, under the code, be arrested; and one in which, before judgment, an order for his arrest has been obtained. Opinions by WATSON, J., and RUGGLES, C. J.— *Corwin* v. *Freeland.*

Art Union. — The plan or scheme of the American Art Union for the purchase and distribution of its works of art among its members, is in violation of the 22d section of the act against raffling and lotteries, which forbids the setting up or proposing any goods or chattels to be distributed by lot or chance to any person who shall have paid, or contracted to pay, any valuable consideration for the chance of obtaining such goods. Opinion by RUGGLES, C. J. — *The Governors of the Alms House* v. *The American Art Union.*

The action was brought to recover three hundred and ten pictures, belonging to the defendants, on the ground that they are forfeited under the 30th and 31st sections of the act against raffling and lotteries.

But those sections apply only to a distribution by chance, dependent on the drawing of some lottery not originally set on foot for the purpose of distributing the property claimed as forfeited, but for the purpose of disposing of some other property; and they, therefore, do not apply to the property in question in this case. Opinion by RUGGLES, C. J. — *The People* v. *The American Art Union.*

Assignment, Voluntary, for benefit of Creditors. A voluntary assignment made by a debtor under failing circumstances, is void if it contain a clause authorizing the assignee to sell the assigned property on credit, because it is calculated to hinder and delay creditors, and reserves to the debtor or

the assignee of his own choice the absolute control over the debtor's property, which, in justice, belongs to the creditor, and enables them, instead of the creditor, to determine when the debt shall be paid. — *Nicholson* v. *Leavitt*.

A debtor, in failing circumstances, has a right to make a voluntary assignment, to select his own assignee, and to give preferences among his creditors. But further than that he may not go in interfering with the right of his creditors, to enforce the payment of his debts by due process of law, at such time and in such manner as to them may seem best. Such is the right of the creditors, and the duty of the debtor is to make an absolute and unfettered dedication of all his property to the payment of his debts. Opinions by EDMONDS and GARDINER, JJ. — *Ib.*

See, also, *Burdick* v. *Post*, decided at this term.

Auctioneers — Their Property and Rights in the thing sold — Private Sales do not affect Public Sales. An auctioneer has such a special property or interest in the subject-matter of the sale, that he may sue for the price in his own name, unless the principal or real owner elect to sue, and it is not necessary to prove any special interest or property; it flows from his position as auctioneer; and proof that he has no interest will not defeat the action. — *Main* v. *Minturn*.

A private sale of the property offered for sale at public auction, made in violation of the statute, does not vitiate the public sale. The object of the statute is to protect the public sale, and its effect is merely to render the private sale void. — *Ib*

But if it were otherwise, the purchaser at the public sale cannot take advantage of the defect by retaining the property and refusing to pay for it. That would be affirming the contract in part, and rescinding it in part. He must rescind it *in toto*, and in order to do that, he must place all the parties in the precise position they were in before the contract was made. If he cannot do that, he cannot rescind. Opinions by EDMONDS and JOHNSON, JJ. — *Ib.*

Banking Associations and Banks — Their Powers and Responsibilities. Every association organized under the act to authorize the business of banking, and the acts amending the same, is a moneyed corporation within the meaning of the statutes of this state relating to moneyed corporations; and is bound and affected by those statutes, excepting only so far as such statutes are inconsistent with the provisions either of the act to authorize the business of banking, or of the act amending the same. — *Pell* v. *The State of Ohio — North American Trust and Banking Company* v. *The Same*.

Such associations are banking corporations, and possess only authority to carry on the business of banking, in the manner and with the powers specified in said act. They have no power to purchase state or other stocks for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received in good faith, as security for a loan made by, or a debt due to, such association, or when taken in payment, in whole or in part, of such loan or debt. Opinions by GARDINER and EDMONDS, JJ — *Ib.*

When a bank, upon the strength of forged powers of attorney, transfers stock on its books to others, destroys the old certificates of the stock and issues new ones instead, whereby the real owner is deprived of his stock, without any authority on his part, the bank is liable to make up the loss to the real owner, either by issuing other stock or making compensation in money: for the reason that the bank, without authority, has interfered with and deprived the real owner of his property. Opinion by WELLES and GARDINER, JJ. — *Pollock et al.* v. *National Bank*.

The plaintiffs made a loan, whereby they received from the borrower certain bonds and mortgages in security for the loan, at an interest of seven per cent., and issued their certificates of deposit bearing four and a half per cent interest, which they gave to the borrower as the produce of the loan. *Held*, that the transaction was illegal, as the company under its charter had no right to issue such paper, to loan or put in circulation as money. Opinion by WELLES, J. — *New York Life Ins. and Trust Co.* v. *Bebee et al.*

Quære, whether the transaction was not also usurious? — *Ib.*

Bills of Exchange and Promissory Notes. — In a suit by the holder against the acceptor of a bill of exchange, the bill may be given in evidence under a count for money had and received, not only at common law, but under the statute of 1832, and the acts amending it. Opinions by RUGGLES, Ch. J., JOHNSON and EDMONDS, JJ. — *Black* v. *Caffe.*

Protest — Due Diligence. Where a party has attempted to protest a promissory note by a notary, and has given evidence thereof, he is not precluded from proving that he has actually protested the note by one not a notary. When there is no dispute about the facts, the question whether due diligence has been used in seeking the residence of the indorser, is a question for the court, and not the jury. Opinions by WATSON and EDMONDS, JJ. — *Hunt* v. *Maybee.*

Sed quære, whether it is due diligence to inquire merely of the holders of the note, and such as they may refer them to, and whether inquiry ought not to have been made of the makers, as to the residence of the indorser, — the maker living in the same town with the notary? — *Ib*

Where the plaintiff was indorser on five notes, on three of which he was not fixed, because they were not yet due, and the defendant promised that if he would pay all the notes, he would pay him $ 1000, there was sufficient mutuality to support the agreement, the moment the notes were paid. And there was sufficient consideration to support the promise, because by paying the notes not yet due, the plaintiff assumed a liability not yet fixed upon him. Opinions by JOHNSON and EDMONDS, JJ. — *L'Amereux* v. *Gould.*

Bill of Lading. A bill of lading is presumptive evidence only of ownership, not conclusive; and it confers title on its possessor, not as consignee, but as owner, and it is competent for a party to show that the consignee was in fact the owner, notwithstanding the bill of lading in favor of the consignee. Opinions by RUGGLES, Ch J., and JOHNSON, J. — *Coit* v. *Winter.*

The possession of the consignee is made to relate to the moment of shipment, in order to render him safe in making advances upon it, or incurring expenses when advised of the shipment. But when that cause does not exist, there is no reason for the relation, nor can it be said to exist. — *Ib.*

Charter Party — Construction — Rule of Damages. Where in a charter party the vessel was described as "The schooner J. H., of the burden of one hundred and ninety tons, or thereabouts, now lying in the harbor of New York," such words were words of description only, and were not a warranty that she was of such a tonnage, or that she was then lying in the harbor of New York. Those are matters open to the inspection of the parties, and will not be regarded as a warranty, unless it is very clear that such was the intention of the parties. Opinions by RUGGLES, Ch. J., and JEWETT, J. — *Ashburner* v. *Balchen.*

The rule of damages, in such case, against the charterer who refuses to perform, is the amount specified in the charter party, deducting only such sum as the vessel earned during the time she would have taken to have performed the voyage, and excluding what she might have earned in her return voyage. — *Ib.*

Condition Precedent, what is. In a conveyance of lands by the Indians, and in a treaty confirming and authorizing such conveyance, it was stipulated that the grantees should not have possession until the value of the improvements made by individual Indians should be appraised by commissioners, as provided in the conveyance and treaty, and such value paid into the war office for the benefit of the Indian owning the improvement. The commissioners were prevented from going on the premises by individual Indians, and reported the aggregate value of the improvements only, and not each one's share, as required by the grant and treaty, certifying that they had been prevented by the force used, &c. *Held*, that that was not a valid excuse, and that the right of the grantees to the possession depended upon the individual appraisement as a condition precedent, which not being performed, the grantees were not entitled to the possession. Opinions by EDMONDS and WELLES, JJ. — *Blacksmith* v. *Kendle*.

Contract — Payment in Specific Articles. Where an undertaking was given, promising to pay a certain sum, by a day named, in iron castings, at the selection of the promisee, if he does not make the selection within the time specified, the promisor has a right to make such selection within a reasonable time thereafter. If he does make such selection, the articles which he selects are those in which the sum is thenceforth to be payable, but if he does not make the selection, and the promisee has not made it, the right to make it from thenceforth rests with the promisee, and the undertaking will be payable in such articles as he may select. Opinions by WELLES, J., and RUGGLES, Ch. J — *Gilbert* v. *Danforth*.

Costs. It would seem that where several joint defendants, who are co-executors, appear by separate attorneys, and put in defences, separate in form, though identical in substance, it is unreasonably resisting the claim, and would justify the court in awarding costs against the defendants personally. Opinions by GARDINER and EDMONDS, JJ. — *Fort et ux.* v. *Goodings, Ex'r.*

Decree, Final containing Special Provisions — Practice. On motion to correct the decree entered on final adjudication in this court, it was ruled by the court, that in all cases where the decree is required to contain special provisions, it must first be duly settled by the court or one of the judges, and after due notice to the other party, before it can be entered by the clerk; and that the decree can be entered without such settlement only when it is merely general of affirmance or reversal, or when the minute of the decision, made by the chief judge and delivered to the clerk, contains specific directions in that respect, rendering a formal settlement unnecessary. — *Disosway, Adm'r*, v. *Carrol, Ex'r.*

Devise, void as suspending Alienation. The devise in the testator's will, of the residue of his estate in trust to accumulate the interest or income arising therefrom, during the life of his sister and her daughter, and the minority of his nephew, suspends the power of alienation for more than two lives in being, and is void. Opinions by GARDINER and JOHNSON. — *Harris* v. *Clark*.

The devise of $30,000 to invest and pay over the interest and income for the same lives, is also void, for the same reason. — *Ib.*

And so, as to the bequest of the avails of a certain mortgage to his niece after the death of his sister, and in case of his niece's death then over to others. — *Ib.*

So much of the will being void, the whole scheme of the will has failed, and, therefore, the whole will must be held void. — *Ib.*

Dower, Mode of Recovery of. Formerly the action of dower could be brought against the tenant of the freehold alone, because he alone could assign the dower. But the revised statutes have abolished that action, and

substituted for it the action of ejectment, which can be brought only against the actual occupant; and if a recovery be had, the dower will be admeasured afterwards. Opinion by RUGGLES, Ch. J. — *Ellicott* v. *Mosier*.

Such recovery and admeasurement bind only the occupant, and not the reversioner or tenant of the freehold, and so too they bind only the particular part occupied by the defendant to the suit, and not other parts of the whole premises in which the dower is claimed, if such other parts are in the occupation of other parties. — *Ib.*

The inconveniences hence resulting may be remedied by the tenant of the freehold applying to be received as a party to defend, or by the widow's having her dower admeasured before she brings her action. — *Ib.*

Eminent Domain — Extent of Interest in the Property taken. The state, in exercising its right of eminent domain, may direct not only as to the quantity of land or property which may be taken for the public use, but also as to the quantity or extent of interest in such property, which may be required or taken for such public use; thus, it may take an estate for life or years, as well as an estate in fee; and where it has been taken in fee or absolute ownership, and paid for as such, it will not revert to the original owner upon the ceasing of the public use. Opinion by WELLES, J. — *Heyward* v. *City of New York*.

Where private property was taken for a public use, as for an almshouse, and the whole value of the owner's interest was assessed and paid for, and he accepted such sum thus awarded, the abandonment of the use of the premises for such public purpose, does not cause the property to revert to the original owner — *Ib.*

Error, Writ of, under the new Statute. It appearing from the affidavits that the judgment in this case was actually rendered after the enactment of the statute allowing a writ of error, although from the record the contrary might be inferred, the motion to dismiss the writ of error was denied. — *People* v. *Clark*.

Factor, Lien of — Waiver. When a factor claims a lien upon the goods in his possession for advance made by him, if, in refusing to deliver the goods to the principal, he puts his refusal on the ground that they belong to him, and not on the ground of the lien, he waives his lien, and cannot afterwards rely upon it to defend his possession. — *Coit* v. *Winter*.

Indian Lands, Intruders upon. In a summary proceeding under the statute, to remove intruders upon Indian lands, no party can be proceeded against to judgment, unless he shall appear in person before the county judge, or be duly summoned so to appear; and though the statute is silent as to such appearance, it is a fundamental principle of law that judgment cannot be pronounced against any party, without giving him an opportunity to be heard. Opinions by EDMONDS and WELLES, JJ. — *The People Ex. rel, Waldron et al.* v. *Soper, County Judge, &c.*

It not appearing in the return to the *certiorari* affirmatively that the lands in dispute were owned or occupied by the Indians, and the statute requiring such ownership or occupation to warrant such summary proceedings; *held*, the proceedings could not be sustained. — *Ib.*

Indictment — Larceny — Jurisdiction — Long Island an Arm of the Sea. The offence charged against the prisoner was that of having stolen money from a steamboat navigating Long Island Sound, on her passage from New York to Norwich, Connecticut, and when somewhere opposite the county of Suffolk, in this state, and he was therefore indicted for grand larceny committed in the county of New York. *Held*, that the indictment could not be sustained, because it did not show whether the prisoner was accused of larceny in New York or on board of a vessel navigating a river, &c., which, in the course of its trip, passed through New York, or of a larceny

committed in another county, and bringing the stolen property to New York. And the conviction could not be sustained, because Long Island Sound, where this offence was committed, is not a river, lake or canal, within the meaning of our statute, but is an arm of the sea. Opinions by WELLES and EDMONDS, JJ. — *Henry Manly* v. *The People.*

Murder — Premeditated Design. The term "premeditated design," used in our statute, defining murder, has the same signification with the phrases of the common law, "malice aforethought" and "malice prepense," except that it intends express design or malice, and not implied. To constitute murder under our statute there must be an express design to kill, and if there is such a design, it is enough that it be formed on the instant, and be a part of the fatal blow. — *People* v. *Clark.*

In cases of deliberate homicide, where there is a specific intention to take life, the offence is murder. The charge of the oyer and terminer was therefore right, when it instructed the jury, that if the killing was produced by the prisoner with an intention to kill, though that intention was formed at the instant of striking the fatal blow, it was murder. Opinions by JOHNSON, J., and RUGGLES, Ch. J. — *Ib.*

See also, *The People* v. *Sullivan*, decided at this term.

Insurance, Statements in application for, how far a Warranty. Where in an application for an insurance, the building sought to be covered by the insurance is described as a storehouse, and the building is so described in the policy, that is a warranty on the part of the assured that at the time of effecting the insurance, the building is a storehouse and is used only as such. Opinions by JOHNSON and WELLES, JJ. — *Wall* v. *East River Ins. Co.*

Lease, Construction of. Where, in a lease of a pier and bulkhead in the city of New York, the lessee covenanted to make, at his own expense, all the repairs which might be necessary upon the bulkhead and pier, and upon all extensions which might be made during the term, and to pay all taxes and assessments upon the demised premises during the term, and during the term there was an extension of the pier under an ordinance of the common council, the expense of which was paid by the lessor; *held*, that the extension thus erected was a part of the demised premises, and belonged to the lessee during the term. Opinions by EDMONDS and WATSON, JJ. — *Hancox* v. *Jacques.*

Lease. In a durable lease, or lease in fee, a clause reserving to the lessor a portion of the price or consideration money upon a sale of the premises by the lessee or his assigns, is void, because repugnant to the grant of the absolute estate. Opinion by RUGGLES, Ch. J.; GRIDLEY and JOHNSON, JJ. — *Depeyster* v. *Michael.*

Mistake, mutual when not corrected. In a sale of land where both in the agreement for the sale and in the deed carrying out the agreement, the premises are described as containing so many acres "more or less," those words being inserted upon deliberation, because neither party professed to know the precise quantity contained in the boundaries of the deed, the courts will not interfere to correct any mistake as to quantity. Opinions by GARDINER and EDMONDS, JJ. — *Fame* v. *Martin.*

And where the contract has been consummated without fraud, misrepresentation or concealment, as to the real quantity, the courts will not inquire whether there has been a mutual mistake as to the supposed quantity contained within certain specified boundaries. — *Ib.*

A mistake of fact between parties will not be corrected unless it is as palpable as if admitted, and has been so great as to produce the conviction, that but for the mistake the contract would never have been made, and, being made, was entirely different from what was intended. — *Ib.*

Mistake, when corrected. When a mistake has occurred in the description of lands conveyed by a deed, as where it has been by mistake stated to be in the south-west corner of a lot, when the land intended to be conveyed was in the south-east corner, such mistake will be corrected, as against the original grantor, and also as against a purchaser from him, with knowledge of the mistake. Opinions by RUGGLES, Ch. J., and WATSON, J. *Miller* v. *Newton.*

Mortgage — Foreclosure. In an action for the foreclosure of a mortgage, a writ of assistance was applied for and resisted by the party in possession, on the ground that he was in possession by valid grant from the mortgagor, before the suit was brought A reference was ordered to ascertain that fact, and to determine whether he was a necessary party to the suit. On the coming in of the report of the referee, the writ of assistance was granted. *Held*, that the order awarding the writ is not the subject of appeal to this court. Opinions by JOHNSON and EDMONDS, JJ. — *Cotheal* v. *Birkbeck.*

Partition, who may maintain Action for An action for partition cannot be maintained by a person, whatever his title, unless he is actually or constructively in possession of the premises sought to be divided, or part of them Opinions by JOHNSON, WATSON and WELLES, JJ. — *Johnson* v. *Valentine.*

Riparian Proprietors, Rights of. The owners of land on the bank of a navigable river, where the tide ebbs and flows, and whose title extends no further than to high-water mark, have no such property in the land under water, or the privilege of using the river as to be entitled to recover damages against a railroad company, who, by grant from the state, construct their road below high-water mark, and cut the riparian owner off from access to the channel of the river. Opinions by EDMONDS and WATSON, JJ — *Gould* v. *Hudson River Railroad Co.*

Trustee and Trust Estate — When each and both are bound. Where a trustee, who held certain lands in trust, to receive and pay over the rents and profits, had, together with the *cestui que trust*, employed an attorney to defend the trust estate from attacks made upon it, and which threatened its existence, the attorney can recover compensation for his services in an action against both trustee and *cestui que trust*, seeking to enforce the claim as a lien on the trust estate: it appearing to the court that there was a proper exercise of the discretionary power of the trustee. — *Noyes* v. *Blakeman et al.*

But where the attorney was employed only by the *cestui que trust*, without the consent or approbation of the trustee, he cannot recover against the trust estate. Opinions by WATSON and WELLES, JJ. — *Ib.*

Verdict, what Defects are cured by. If, upon issue joined, it was necessarily required that the fact omitted or defectively stated in the pleadings should have been proved, or the court would not have permitted judgment to be given, the defect or omission is cured by the verdict. — *L'Amoreux* v. *Gould.*

Warehouseman, Responsibility of. A warehouseman's receipt does not cover any goods, except such as are actually in his possession at the time of giving it, and though assigned to a third person who has in good faith advanced money upon it, does not give him any claim to or title in property afterwards delivered to the warehouseman. — *Gardiner* v. *Suydam et al*

In this case, the defendants advanced money on a warehouseman's receipt for five hundred and thirty-six barrels of flour, when it appeared that he had only two hundred and eleven barrels in his possession at the time. *Held*, the defendants could claim only for the two hundred and

eleven barrels, as against third persons, although the warehouseman afterwards received enough more to fill the receipt. Opinion by RUGGLES, C. J. — *Ib.*

Warehouseman, when Agent of the Parties. Where the plaintiff and the defendants were owners of several parcels of grain which were stored with the same warehouseman, such warehouseman, in delivering the grain, acted as the agent of the owner who directed the delivery, and such owner was responsible for his acts in regard to such delivery. — *Cobb* v. *Dows et al.*

So that when the defendants gave an order on the warehouseman to deliver their grain, and by mistake or otherwise he delivered the plaintiff's and not the defendants', whereby the defendants received the benefit of such delivery, as if it had been their own; it was *held*, that the plaintiff can recover the value of the defendants, they being responsible for the wrongful act of the warehouseman, who, in the delivery, acted as their agent. Opinion by GARDINER, J. — *Ib.*

Witness. One of several co-executors, who are joint defendants in the suit, is not competent as a witness for his co-defendants; for where a party is so situated that his testimony must necessarily accrue to his own benefit and operate in his own behalf, as well as that of his co-defendants, he cannot be examined as a witness for them, and he can be so examined only when his testimony can be used for the other parties, without being available to him. — *Isaac Fort and Wife* v. *Gooding's Ex'rs.*

Witness, Evidence to support. Merely evidence of certain conduct on the part of a witness, which may affect his general character, is not enough to admit evidence to support the general character; it must also appear that the general character has been thereby affected, or that the conduct was such as necessarily to affect it. — *People* v. *Gay.*

Thus in Rector's case, the evidence to support general character was admissible, because the particular conduct proved against the witness would of necessity, and as a matter of course, affect his general character. In the case now under consideration, such evidence was inadmissible, because the conduct proved did not necessarily affect the general character. It might or might not do so, and therefore there must be proof that it has done so, before rebutting evidence as to general character would be admissible. Opinions by JEWETT, WELLES, and EDMONDS, JJ. — *Ib.*

New York Superior Court.

Action for Negligence — Failure to recover when Party is also in fault — Evidence. Where the carelessness and imprudence of the person injured by a collision on a railway, contributes to the injury, an action for damages cannot be sustained against the company. As, where a party driving at a rapid rate across the track of a railroad, and it appears that near the point of intersection, a high embankment between the railroad and the highway, rendered it impossible for a person on the highway to see the cars coming until he gets on the track; *held*, that such rapid driving, at such a place, constitutes a degree of negligence that defeated any right of recovery for damages in consequence of a collision. — *Hanny* v. *N. Y. & Erie Railroad Co.*

Where there is no conflicting evidence on the question of negligence, or where the proofs do not leave the matter in doubt, it is not necessary to submit the matter to a jury. It is competent, and it is the duty of the court to withdraw the same from them, and nonsuit the plaintiff; and in most cases, where a verdict may be set aside as against the weight of evidence, a nonsuit would have been proper. — *Ib.*

Factor, Lien of — Rights as against Third Parties who have made Advances. M., residing at Gottenburgh, consigned a cargo of iron to the defendants at New York, with instructions to remit the proceeds to the plaintiff at London, as the consignor's agents or bankers; they having made advances to M. upon the shipment, with the understanding that M. should transmit to them bills of lading and the usual shipping documents, and that they should receive the proceeds; but the defendants were not informed of this arrangement: *held*, that whatever was the private understanding, or the actual state of affairs between M and the plaintiffs, the defendants not being notified of it, had all the usual rights of factors in respect to the shipment of iron; and that the plaintiffs had no lien upon it, in virtue of their advances, as against the defendant's claim for a general balance against the consignor. — *Reynolds* v. *Davis*.

Highways, Liability of Commissioners of. As a general rule, private actions cannot be maintained against commissioners of highways, for neglect in not repairing the highways and bridges in their respective towns, unless it be shown that they had the requisite funds for that purpose in their hands, or under their control. — *Hutson* v. *Mayor &c. of New York*.

But this rule does not apply to the corporation of the city of New York in their capacity of commissioners of highways. They having within their control the funds for repairing the highways, or being in fault for not having them, their duty to repair is absolute; and consequently they are answerable in damages to any person sustaining an injury by reason of their neglect of duty. An avenue in the city of New York, laid out as such by commissioners appointed for that purpose, and over which the mayor and common council have exercised their power, by regulating it, and causing the curb and gutter to be set, defraying the expenses by assessment, is under their jurisdiction and control, as a municipal corporation. — *Ib.*

After such corporation have actually opened a street or avenue for the public accommodation, and by their acts have invited the public to travel over it, the duty to keep it in repair becomes absolute; the fee of the streets being vested in them, and they alone having the power as well as the means to repair. — *Ib.*

But it does not follow from this doctrine, that the corporation is liable for every obstruction or nuisance created by third persons, in the public streets, in violation of the city ordinances. — *Ib.*

Where an individual or a corporation have a fixed and certain duty assigned to them, of a merely ministerial character, and the means placed at their disposal, sufficient for its performance, they are under obligations to perform it, at the risk of being made to answer for the consequences of their neglect. — *Ib.*

Whenever an indictment lies for non-repairs, an action on the case will be at the suit of an individual sustaining any peculiar damage, arising either from nonfeasance or malfeasance. — *Ib.*

Thus, where a municipal corporation is under a legal obligation to repair streets, and an indictment will lie against it for not repairing, and in consequence of their suffering a street to be out of repair, individuals sustain damages to person or property, an action will lie against the corporation. Opinion per Mason, J. — *Ib.*

Lien — Lien on Land, what is, &c. — Bill filed to set aside Fraudulent Conveyance, &c. &c. Where, by a decree in chancery, the lands of a testator were directed to be sold for the payment of his debts and other charges, and by a subsequent directed order, the surplus proceeds arising from such sale were directed to be paid to three of the six tenants in com-

mon, entitled to the lands under the will, and the order provided that the shares of these devisees in the remaining lands of the testator should be charged with the amount thus received by them. *Held*, that such a charge did not create a legal title in or to any undivided portion of the lands in favor of such devisees, and was not therefore subject to the lien of a judgment against either of such devisees. *Held*, also, that the right or interest of the devisees, in whose favor such a charge was created by the decretal order, was neither lands, real estate, tenements or chattels real, with the meaning of 2 R. S. 359, § 3, in respect to the lien of judgments. — *Scudder* v. *Voorhies*.

Held, further, that where one of such devisees conveyed all his estate real and personal, to which he was entitled under the will of the testater, as well as his interest in the charge created by the decretal order and by a special covenant in the deed, the grantee agreed to assume the payment of an existing judgment against the devisee, and such conveyance was subsequently set aside as fraudulent against creditors, the interest of such judgment creditor as a beneficiary of the trust created in the conveyance, if it were a trust, was effectually cut off. In such bill, or in any bill filed to set aside an assignment for the benefit of creditors, it is sufficient to make the trustee a party defendant. — *Ib.*

Pleading — Sufficiency of Averments — Contracts in violation of Statutory Law, void. It is sufficient in a pleading to aver generally, that a contract sought to be enforced, is in violation of some municipal ordinance or enactment, when such ordinance or enactment is founded upon a statute. It is not necessary to plead the statute specially — *Beman* v. *Tugnot*.

A contract made in violation of a statute having a merely local or municipal application, is as illegal as if the statute in question had been of universal application. — *Ib.*

Promissory Note — Contract of Indorsement — Form of Notice of Protest. The liability of an indorser of a promissory note or bill of exchange, is governed in all cases by the law of the place where the indorsement is made, and by the indorsement is to be understood the contract itself, not the mere act of writing the name on the back of the instrument. It matters not when or where this may have been done, since there is no indorsement binding him as a contract, until the note or bill is transferred to a third person with the intent of enabling him to enforce its payment; the place of this effectual transfer, is therefore the place of the contract, and the law which there prevails, govern its construction. — *Cook* v. *Litchfield*.

Where the defendant, being a resident of Michigan, indorsed certain promissory notes for the accommodation of the maker, who was also a resident of that state, and the notes so indorsed, were sent by the maker to his agent in New York, to be delivered to a creditor of the maker residing in New York, in satisfaction of his debt; *held*, that the indorsement as a contract was made in New York as certainly as if the transfer which gave a title to the notes had been made by the indorser in person, the agent of the maker being to all intents the agent also of the indorser, for the purpose of a transfer and delivery. — *Ib.*

By the laws of New York, a notice to an indorser is sufficient, which expressly, or by a reasonable intendment, conveys to his mind all the information that he was entitled to have. It must contain such a description of the note, as might have enabled the indorser to ascertain its identity, and must also communicate the fact of its dishonor. — *Ib.*

Where no doubts are raised by extrinsic facts, the question of the sufficiency of a notice of protest is to be determined by the court. — *Ib.*

The omission to state, in a notice of protest, the time when, and the place where a note became payable, are immaterial, if the facts which are

stated are sufficient to convey all necessary information; and if the indorser has indorsed other notes of a like tenor, and an uncertainty in the application of the notice may have arisen, the onus is upon him of showing it. — *Ib.*

A notice of protest, which stated that the note "was on the day that the same became due, duly protested for non-payment," communicated by necessary implication the fact that a demand of payment was made on the proper day, and at the proper place, and was refused, and was therefore a valid notice. — *Ib.*

The same construction is applicable to notices of protest of promissory notes, as of bills of exchange. — *Ib.*

The pendency of a prior suit in the courts of the United States, or the courts of a sister state, is no bar to an action. — *Ib.*

Miscellaneous Intelligence.

The License Question. Opinion of Mr. Justice Russell. — In the Police Court of Boston, August 28th, Mr. Justice Russell, in the case of the *Commonwealth* v. *Moses Williams*, charged with selling a pint of brandy to Calvin S. Mixter, delivered the following opinion, previous to reading of which, he remarked that it was entirely his own, he not having been able to consult his associates.

"The defendant being charged with a violation of the act, concerning the manufacture and sale of intoxicating liquors, passed May 22, 1852, sets up, as one ground of defence, a license to retail intoxicating liquors, granted to him by the mayor and aldermen of Boston, on the 19th of April last, under chapter 47 of the Revised Statutes. And upon this, the question arises, whether such a license protects the defendant in making a sale of such liquor. It is contended for the government, that the authority given by the license is withdrawn by the passage of this statute. The defendant claims that his license is a contract, protected by the provisions of the United States constitution. He also contends, that the repealing clause in the last section of the act of 1852 saves his license. It is unnecessary to say, that the case, like every other, is to be decided, not according to our wishes or our views of the propriety of the act in question, but solely according to law. All our desires and opinions must bend to the authority of the statute, and the statute itself must yield, if it conflicts with the paramount authority of the constitution.

"The United States constitution provides (Article 1, Sect. 10,) that no state shall pass any law, impairing the obligation of contracts. We are, therefore, to decide whether the defendant's license is a contract, and if it is one, whether a law rendering it invalid, would impair its obligation. It has been decided by the Supreme Court of the United States, in the case of *Fletcher* v. *Peck*, (Cranch, 87,) that this clause applies to grants or executed contracts, and to contracts made by a state, as well as to those made by an individual. And, in this case, it was held that a grant of land made by the state of Georgia, could not be revoked by subsequent legislation.

"In *New Jersey* v. *Wilson*, (7 Cranch, 164,) it was held, that an act of the state, exempting certain lands from taxation, formed a contract with the grantee, which could not be violated by the legislature.

"In the famous case of *Dartmouth College* v. *Woodward*, (6 Wheaton, 656,) this principle was applied to the grant of a college charter, and it was also held that the amount of consideration for the contract in such a case, is a matter of no importance. Judge Story says, in giving his opinion, (p. 687,) that the grant for franchises is not, in principle, dis-

tinguishable from the grant of any other property. 'If the charter were a pure donation, when the grant was complete and accepted, it involved a contract that the grantee should hold the grant, as much as if it had been founded on the most valuable consideration.' 'A pepper-corn,' he adds, 'is as good a consideration as a thousand dollars.'

"The law is thus laid down by Story, J., in his Commentaries on the Constitution, p. 506 and 706:

"'It has been already stated, that a grant is a contract within the meaning of the constitution, as much as an unexecuted acquirement. The prohibition, therefore, equally reaches all interference as with private grants and private conveyances, of whatever nature they may be. But it has been made a question, whether it applies in the same extent, to contracts and grants of a state created directly by a law, or made by some authorized agent in pursuance of a law. It has been suggested, that in such cases it is to be deemed an act of the legislative power; and that all laws are repealable by the same authority which enacted them. But it had been decided upon solemn arguments, that contracts and grants made by a state, are not less within the reach of the prohibition, than contracts and grants of private persons; that the question is not whether such contracts or grants are made directly by law, in the form of legislation, or in any other form, but whether they exist at all. The legislature may, by a law, directly make a grant, and such grant, when once made, becomes irrevocable, and cannot be constitutionally impaired. So the legislature may make a contract with individuals, directly by a law, pledging the state to a performance of it; and then when it is accepted, it is equally under the protection of the constitution. And it may be laid down as a general principle, that whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law cannot divest those rights, or annihilate or impair the title so acquired. A grant amounts to an extinguishment of the rights of the grantor, and implies a contract not to reassert it.'

"I cannot doubt that a license, legally issued, and not made revocable at the pleasure of the grantors, would be such a contract as the constitution protects, and that a law attempting to annul such a license would be a law impairing the obligation of a contract. A license is a grant of a valuable right; it is an agreement that the person licensed may sell liquors without molestation; an agreement not to inflict a penalty. An agreement is a contract. It has been expressly held, that a grant of a franchise is a contract within the protection of the constitution. A license seems to be included in the definition of a franchise, given by Chancellor Kent in his Commentaries, vol. 3, p. 565. 'Franchises are certain privileges conferred by grant from government, and vested in individuals.' And it is added, 'they contain an implied covenant on the part of the government not to invade the rights vested. But, if a license is not technically a franchise, it is in the nature of a franchise, and every reason, that brings the grant of a franchise within the protection of the constitution, applies with equal force to the grant of a license.

"It is clear that a promise to license, if made by the authority of the state, would be a binding contract. And it does not cease to be a contract, when it is executed and accepted. Chief Justice Marshall says, in *Fletcher* v. *Peck*, cited above, that it would be absurd to hold that an agreement to convey land should be protected as a contract, and that an actual conveyance should not be protected. It would be just as absurd, in case of an executed agreement to license.

"As to the consideration, the defendant has paid a dollar, which is the sum required by law to be paid for a license.

"It is matter of familiar law that the validity of a contract does not depend

upon the amount of consideration. And it is equally well settled, that a grant from the government, whether of land, or of a franchise, or of a privilege, needs no consideration whatever to support it. And this case would stand in the same light, if no fee had been required.

"The next question, (which will be an important one,) is, Who is the party that made the contract with the defendant? Was the grant made by the mayor and aldermen, or by the commonwealth? Upon this point, the counsel for the government and the counsel for the defendant were agreed, that the state was the principal, granting the license, and that the mayor and aldermen were merely agents acting for the state. And this clearly is the correct view of the case.

"The law forbidding the unlicensed sale of intoxicating liquors was a state law. The penalties under that law accrued to the state. And the permission to sell, which was given by a license, was granted, as Judge Story says it may be, by the authorized agent of the state, acting in pursuance of law. Such an act is the act of the principal, and the principal was the state of Massachusetts. A license is no more the contract of the mayor and aldermen, that a contract made by a board of commissioners, acting in the name, and in behalf of the state, is their own contract. Illustrations might be multiplied, but it is unnecessary, because this position is conceded on all sides.

"It makes no difference that the fee is received by the mayor and aldermen; for it is not necessary that the grantor should receive the consideration paid by his grantee.

"The state, then, contracts with the person licensed, that he shall be allowed to sell intoxicating liquors for a certain period. Can it be doubted that a law forbidding him to sell during that period would violate the obligation of his contract? Suppose the state had chartered a corporation, with power to make and sell intoxicating liquors for a term of years, could that power be taken away, by subsequent legislation, without impairing the obligation of a contract? But is a grant any less a contract, when it is made to one person than when it is made to a number? Or does it alter the principle, that the right is acquired under a general law, and through the authorized agents of the law? None of these particulars affect the reason of the case, or make the grant any the less a contract.

"The privilege of running a ferry is acquired in the same way in which the right to sell intoxicating liquors was acquired under the Revised Statutes, namely, by a license granted by the county commissioners, or by the mayor and aldermen of Boston. And it is illegal for any person to run a ferry without a license. Such a license, however, is, by statute, revocable at the pleasure of the agents granting it. It will hardly be contended that such a license could be annulled, and the franchise of the ferryman or ferry company be destroyed, without any act on the part of the mayor and aldermen, by the mere passage of a law forbidding any person hereafter to run a ferry, on the ground that ferries were no longer necessary for the public good, or that they had become nuisances. Such a law would surely be unconstitutional, unless it provided a recompense for the property which it destroyed.

"From these considerations, I think it clear that this license, if it had been granted according to the provisions of the statute, would not have been rendered invalid by the act of 1852. The injustice of such a course would be more apparent, if the fee for a license had been ten thousand dollars; but the principle would not have been, in the least degree, different.

"The case of *Coates* v. *City of New York*, (7 Cowen, 585,) was cited in opposition to the principles which are here laid down. It is enough to say of this case, that it is not precisely in point; and that just as far as it conflicts with these principles, it conflicts with the decisions of the Supreme

Court, which have been already cited. Other cases bearing on the point might have been quoted; but those given are decisive, and they are the judgments of the court of final resort in questions of this nature.

"The next point relates to the form of the license. The mayor and aldermen have reserved a right of revocation at pleasure, which certainly is not given by the words of the statute, and which perhaps they had no right to reserve. The able counsel for the complainant contends that a license, which the mayor and aldermen may revoke at pleasure, is not a contract. It is, in his view, like a permission given to a tenant to occupy a house until the owner revokes that permission. Such a promise, it is argued, creates no binding obligation. This would be a parallel case, if the mayor and aldermen were the contracting parties; but in that case, it would be answered, that while they did not revoke the license, it continued to be a valid contract. But it is agreed on all hands that they are only the agents. And the case is like that put by the defendant's counsel. He supposed that A., the owner of a house, empowers B. to let it for a year. B. lets it to C. for one year, reserving to himself the right of revoking the lease. And no one will contend that A. could annul the lease within the year, unless B. exercises his right of revocation. Here, the state is the principal. The mayor and aldermen are agents, authorized to grant a privilege for one year. They reserve a right (without authority) to revoke the grant. But they do not revoke it, nor wish to revoke it, and the principal gains no power to do so.

"It is unnecessary to decide whether the mayor and aldermen had the power to reserve this right of revocation, and whether they can exercise it now. It is enough to say, that they have not chosen to exercise it in this case, and that, even if it were not within their authority to insert that clause, its insertion does not invalidate the license; a point which was not argued, and upon which there seems to be no doubt.

"It was suggested that the passage of the act of 1852, revoked the authority of the mayor and aldermen, and that the publication of the statute was a notice to the defendant of that revocation. But this argument begs the question; for it assumes that a question can be revoked, and that this act is such a revocation. The statute revokes the authority to grant future licenses; but the principal cannot annul a contract, made by an authorized agent, although his authority to make any further contracts may be withdrawn.

"Such being the opinion of the court, it is unnecessary to consider the question, whether the defendant's license is saved by the repealing clause of the act, nor is it necessary to decide whether the legislature intended to invalidate the licenses, since, upon the principles here laid down, they had not the power to do so.

"It has been suggested, although not in the trial of this case, that, as this is a court of inferior jurisdiction, questions of law should be ruled for the government, in order to give an opportunity for an appeal. Whatever may be the duty of the court in a doubtful case, it would certainly be a gross violation of duty to decide against the defendant in a case, which seems to me as plain as this. It would be to condemn a man, whose innocence is clear. I feel bound by my oath of office to acquit the defendant of the offence with which he is charged. There are other means of testing the validity of licenses than the method proposed. And if there were no other means, it would not alter my duty, or release me from the obligation to do justice to the accused. It is fortunate, that a case of so much importance has been argued, on both sides, by learned and ingenious counsel.

"I repeat my regret that there has not been an opportunity to obtain the opinions of my colleagues, my seniors in age, and superiors in legal attain-

ments. But, as I have said before, this does not seem to me to be a doubtful case, and my high regard for them only increases my confidence that they would sustain this decision, if the point should ever be raised again. Nothing remains, but to order that the defendant be discharged."

PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON. — By an order introduced into the Senate of Massachusetts, May 14, 1852, the Justices of the Supreme Judicial Court were requested to give their opinion upon the question, whether the corporation known as "The Provident Institution for Savings in the town of Boston," chartered in the year 1816, is subject to the general laws of the Commonwealth, relating to Savings Banks and Institutions for Savings, passed since the granting of the said charter. The judges have given their opinion under date of September 20th, portions of which are given below. The judges, after speaking of their great embarrassment in expressing an *ex parte* opinion upon a question relating directly to the rights and duties of a private corporation under existing laws, and referring to a similar expression of embarrassment in their opinion reported in 5 Met. 597, proceed to say:

"By an act of the Legislature, passed March 11, 1831, and in which, with some changes not necessary to be particularly stated, is re-enacted in the Revised Statutes, ch. 44, sect. 23, it was enacted, 'That all acts of incorporation which shall be passed after the passage of this act, shall at all times hereafter be liable to be amended, altered or repealed, at the pleasure of the Legislature, and in the same manner as if an express provision to that effect were therein contained; unless there shall have been inserted in such act of incorporation an express limitation as to the duration of the same.'

"There are now four Savings Banks, or Institutions for Savings, in whose acts of incorporation there is no express provision, subjecting them to the control of the Legislature, and which were incorporated before the passage of the above-mentioned act of 1831. These four institutions are those at Boston, Salem, Newburyport, and Roxbury, whose acts of incorporation are all perpetual. The present inquiry is confined to the Provident Institution for Savings in Boston, and is, whether that institution, and, of course, other similar institutions, similarly situated, are subject to the general laws, which have thus been passed in relation to Savings Banks, or whether they are beyond or above the reach of these laws; and this depends upon the question, whether or not the provisions of the laws are consistent with the chartered rights of the institution.

"The question propounded is, in general terms, whether the Institution for Savings in Boston is subject to the general laws relating to Savings Banks, referring to no particular law, nor to any specified provision or provisions of the laws, and, therefore, embracing all the various provisions of these several laws. But upon examining the recent report of the bank commissioners, the only question which appears to have been raised by the Provident Institution for Savings in Boston, in regard to the general laws relating to Savings Banks, is whether that particular institution is bound to make its investments in conformity to the provisions of these general laws. The judges therefore confine their attention to this portion of these general laws, as being the only portion, the binding force of which appear to have been called in question, believing that, in so doing, they will satisfactorily meet and answer the inquiry of the Senate."

The laws relating to the investment of deposits in Savings Banks, are Revised Statutes, chapter 36, §§ 78, 79, and the Act of March 5, 1841, ch 44. The inquiry is, whether the Provident Institution for Savings in Boston is bound by the provisions of these laws.

"In making these enactments, there is no doubt, that the great purpose of the Legislature was, to protect the depositors from loss and injury, and that there was no intention to take away from Savings Banks any powers necessary to the accomplishment of their appropriate business, but only to guard against the improvident exercise of those powers.

"But are the general laws in regard to the investment of the deposits of Savings Banks inconsistent with the rights of the Provident Institution for Savings in Boston, as secured to it by its charter? The charter provides, that the corporation shall be capable of receiving deposits, and enacts, 'That all deposits or money received by the said society shall be by the said society used and improved to the best advantage.' This last clause might, perhaps, be considered as merely enjoining a duty, and the general law, which prescribes how the investment shall be made, as pointing out the mode in which that duty shall be performed. But at all events, the charter prescribes no mode in which the investments shall be made, but is entirely silent on that subject. There is no grant or provision, whatever, in relation to it. If the Provident Institution for Savings in Boston claims the privilege of exemption from legislative action, on one of the legitimate subjects of legislation, it must show that that privilege is granted in their charter. But there is no such express or implied grant. This corporation possesses only such powers as are either expressly or impliedly granted by its charter. There is no express grant in the charter for any power whatever, in relation to the mode of making investments.

"Incidental or implied powers, upon just principles of construction, can be made to embrace, at most, only such powers as are essentially necessary to enable the corporation to accomplish the purposes of its creation. Now the provisions of the general laws, prescribing the modes of investment, so far from taking from the corporation any power necessary to accomplish its appropriate business, are directly in aid and support of that power, and adapted and designed as safeguards to the corporation, that it might accomplish its appropriate duties, with greater safety and advantage, and the better answer the design of its creation.

"It may, perhaps, be said, that the corporation, at the time it took its charter, could invest its deposits at its own discretion, without restriction as to the modes of investment. Be it so. But it thus acted, not by virtue of any special power or privilege granted in the charter, in relation to investments, because the charter is silent on that subject, but wholly under, and by virtue of the general laws of the Commonwealth. No special power or privilege being given in the charter, as to the mode of conducting its business, the corporation managed all its affairs according to the general laws. It took its charter subject to the general laws, and, of course, subject to such changes as might be rightfully made in such laws. The Legislature surely did not guarantee to the corporation that there should be no change in the laws, that the whole system of legislation should remain as it was in 1816. There were at that time no general laws in regard to Savings Banks, as there were no Savings Banks. But after these institutions were established, and had become numerous and important, it was within the appropriate power of the Legislature to make such general laws for their regulation as the public good might require, and there was nothing in the charter of the institution at Boston to exempt it from the operation of these general laws, and it must of course be subject to them, in common with all the other similar institutions. The Legislature, by giving to the institution in Boston the privilege of being a corporation, and of managing its proper business, did not relinquish any power of legislating on all proper subjects of legislation. The institution, at the time it was incorporated, had the right and power, under the gen-

eral laws, to loan money at six per cent. interest, but there can be no doubt that the Legislature could alter the law, so that the institution could take only four or five per cent interest. The corporation had power under its charter, to hold and dispose of property, but there was nothing in the charter as to the mode, and, of course, the property could be held and disposed of only according to the general laws, which the Legislature might, at any time, alter, and the corporation would be bound by the alteration. The corporation might indorse and negotiate promissory notes, but only according to the general laws, as there was nothing in the charter on the subject, but the Legislature might change the whole law on this subject, at any time, or take away altogether, by general laws, the right to indorse and negotiate notes, and these laws would be binding on the corporation. But it cannot be necessary to extend these illustrations. The Legislature cannot be deprived of the power it holds for the public good, by any doubtful construction, or remote inference.

"The position, that the Legislature has granted away any of its appropriate powers of legislation, can be supported only by clearly showing such grant. In the present case, there appears to be nothing in the charter of the Provident Institution for Savings in Boston, to exempt it from the provisions of the general laws, passed since the date of the charter, relating to Savings Banks, prescribing the modes of investments, and the undersigned are, therefore, of opinion, that that institution is subject to those provisions of those general laws.

Atheists as Witnesses in Virginia. — We have received the following communication from Virginia: "The leading article in your last number, in which it is insisted that Atheists ought to be admitted as competent witnesses in courts of justice, suggests a recent decision of the late General Court of Virginia, (a convocation of circuit judges with final appellate jurisdiction in all criminal cases,) in which the admission of such witnesses is vindicated on higher ground than those urged by your correspondent. I refer to the case of *Perry* v. *The Commonwealth*, (3 Grat. R. 632,) decided December, 1846. On the trial, a witness was produced on the part of the Commonwealth, to whose competency the prisoner objected on the ground of his religious opinions. Upon interrogatories propounded by the prisoner, and voluntarily answered by the witness, it appeared that the witness 'believed in a God, the Creator and Governor of the Universe, but did not believe that mankind would be rewarded and punished in a future state of existence for their good and evil actions in this life, but that offences will meet their punishment here. The court being of opinion that the Constitution and Bill of Rights secure to every citizen perfect freedom of opinion in all matters of religion, and that to deny the capacity to testify as a witness in a court of justice on account of religious opinions, would operate as a restraint upon the freedom of opinion secured by the Constitution, overruled the objection,' and admitted the witness. The prisoner being convicted, obtained a writ of error from the General Court, where the question was elaborately argued by distinguished and able counsel. The court affirmed the judgment, maintaining the broad proposition laid down by the Circuit Court, and holding the only error of that court to consist in allowing the witness to be questioned in relation to his religious opinions, which, being favorable to the prisoner was no ground of reversal. The opinion of the court, delivered by one of its most distinguished members, discusses the question with consummate acuteness, and likewise with great zeal and earnestness. The judges, a dozen or more being present, were unanimous, and the case seems to be regarded as settling the question finally in this state." W.

Western Law Journal. — This excellent contemporary periodical, edited by T. Walker and M. E. Curwen, Esquires, closed its ninth volume with its September number. We give its notice to readers.

"With this number closes our ninth volume. As the reader has probably already observed, it has not been so much the aim of the editors to occupy the pages with articles from their own pens, as to collect, from all sources within their reach, whatever to them seemed of general interest to our profession. That they have not succeeded, in the execution of this purpose, in pleasing every subscriber, they are aware. The only pleasure of some men, is to be displeased. But many gratifying assurances have reached them of its general acceptableness. Of the extent and variety of the topics, the Index will furnish the best evidence.

"The tenth volume will commence in October. The editors, the times of publishing, and the terms, will remain unchanged. It may not be improper to add, what is known to all our personal friends, that this journal is not a *pecuniary* object to us. It was established in accordance with a resolution of the Ohio Bar, assembled at Columbus, nine years ago, and it looks to that Bar mainly for support, both in contributions to its pages and in the prompt payment of all who have subscribed to the work."

A French Trial. — A very French trial before the Paris Tribunal of Correctional Police is described in the Paris papers. Gervais and Mathieu are dealers in second-hand books, living next door to each other; there was much rivalry between them. Mathieu was unwell; Gervais recommended a salad of young elder-leaves; Mathieu took the remedy, and was laid up for three days. He accused his rival of recommending the salad, that he might be incapacitated for business, and thus give Gervais an opportunity to carry all before him. The defendant declared that the patient had eaten immoderately of the salad; which was not denied. The amateur doctor was acquitted of wilfully injuring his neighbor, but as he had derived advantage from his rival's illness, the court fined him twenty-five francs for the illegal practice of medicine.

Notices of New Books.

The Theory of the Common Law. By James M. Walker. Charleston, S. C. "At jus privatum sub tutelâ juris publici." — Bacon. 1 vol. 8vo. pp. 130. Boston: Little, Brown & Co. 1852.

The attempt to delineate the theory of the common law, in an octavo of one hundred and thirty pages, is certainly a new thing in the recent history of making law books. Yet Mr. Walker has succeeded in clearly stating his views thereon in a treatise which we agree with Professor Greenleaf in thinking to be "eminently suggestive." The work is divided into thirty chapters, the subjects of most of which are the leading titles in the common law. We give a few extracts from Chapter XXVIII, entitled "Retrospect," and from the concluding chapter, which will indicate the contents of the book, and the author's mode of treatment.

"The inquiry which we have made has exhibited the fact that the common law in all its parts, political, civil, and social, rests upon the principle of the attribution of sovereignty or political power to the proprietors of lands. They alone possessed a voice in the government, — the right of representation, of imposing taxes, of holding high places. The non-landholder was impotent. Time has greatly modified this law, even in England: but property is still there the source of power. In this country much has already been done to take away all direct influence from property; its indirect influence, in the shape of corruption, must continue, and

history teaches us that it will increase, as population becomes more dense. The utility of this change, from the direct to the indirect, the wisdom of reversing the common law rule of attributing power to landed property, are questions without the scope of the present inquiry. But it may be observed that, at the bottom, they really resolve themselves into the question of the best form of government. A great statesman, lately deceased, has stated with great clearness and force the arguments in favor of the concurrent majority, — the union of numbers and taxation, — power and property. His disquisitions are not, in this respect, novel in theory, but old, and approved by the experience of a great and happy and highly civilized people. But it may, nevertheless, be utterly inconsistent with the very different form of government under which we live. Right or wrong, it does present for our consideration the gravest question which can employ the thoughts of any people."

"Then it is not less a momentous question to individuals, What will be the consequence to private property of the recognition of the principle that political power does not belong to property? Some bold theorists have already announced the consequences; and, admitting it to be true that numbers, the majority, are the rightful owners of the power of the state, it will be difficult to refute the inference that they may dispose of the whole state, and therefore of every part of it. Power is human will, — applied to things it creates property, and has the masterdom and disposition of it. Why, then, should the rightful owners of the power, the life, of the state, not participate in the property which sustains that life? Why should the state not feed upon the property of the state? All men are equal, — one generation cannot bind another, — governments may be changed at pleasure, — the majority can do no wrong. These are principles which seem not uninteresting to the possessors of property. It is possible that the fundamental maxim of the common law is unjust to mankind. Certainly the architects of it did not intrust the preservation of property to those who might have an interest in its destruction." — pp. 117–119.

"The analysis of the fundamental principles of the Common Law has been made. It has been shown that our system is not 'a shapeless mass of materials,' as has been supposed by very eminent European jurists; and that there is a principle pervading it uniting together all parts of society, and controlling the state and the family, the beginning and the end of humanity."

"Our exposition has traced the rules of the law of real estate to the mixed law of the Middle Ages. Occasion has also been taken to exhibit some of the more important analogies between the Common and Civil Law, and to indicate the particular instances in which courts of justice and law writers were obliged to adopt such rules of the latter as were not inconsistent with the political principles of the former. The affinities of the two systems would perhaps justify a more extended examination, but it is sufficient to say that it is a matter of well-founded surprise that the common law judges have so frequently resorted to the civil, and that it has been tolerated to so great a degree."

"Finally, I have endeavored to show that our system of jurisprudence consists of many subordinate parts, all of which are connected by beautiful dependencies, and each of them, as I have fully persuaded myself, is reducible to a few plain elements, that will commend themselves to our natural reason, or be justified by the history and situation of our political ancestors. But if the law be merely an unconnected series of decisions and statutes, its use may remain, though its dignity as a science be lost. Reason must yield its supremacy to memory, and the *cantor formularum* is the greatest of lawyers." — pp. 127 - 130.

Reports of Cases argued and determined in the Supreme Judicial Court of the State of Maine. By Simon Greenleaf, Counsellor at Law. With Notes, and References to subsequent Decisions and Statutes. By Edmund H. Bennett, Counsellor at Law. Nine vols. in eight. 8vo. Second Edition. Little, Brown & Co. 1852.

The labors of Mr. Bennett, who is now very generally known as one of the Editors of the English Law and Equity Reports, have added to the value of this well known and excellent series of Reports. As the title indicates, not only the subsequent decisions in Maine and other states have been collected, and digested in notes, but what is a new feature in the second editions of Reports, the subsequent statutes, or an abstract thereof, are given.

The Institutes of Justinian, with Notes. By Thomas Cooper, Esq., Professor of Chemistry at Carlisle College, Pa. Third edition, with additional Notes and References. By a member of the New York Bar. One vol. 8vo. pp. 710. New York: John S. Voorhies, 1852.

The body of this book is Dr. Harris's translation substantially of the Institutes, the original and the English being given in parallel columns on the same page. Dr. Harris's brief history of the Roman law precedes the Institutes, which are followed by Dr. Harris's translation of the 118th Novel. The notes and references are printed by themselves, and follow the body of the work. A first Appendix gives a translation of fragments of the laws of the twelve tables; a second, the method of citation of the Corpus Juris Civilis, and the abbreviations; and a third, a list of authors on the civil law. By means of a full Index, a ready reference can be had to the varied contents of the book. We think it would have been better to have retained in this edition the table of the English and American cases cited in the notes, which was given in the edition of the work published at Philadelphia in 1812.

New Publications received.

Reports of Cases argued and determined in the Supreme Court of the State of Vermont. Vol. XXIII. New Series. By Peter T. Washburn, Counsellor at Law. Vol. VIII. pp. 813. Woodstock: Haskell & Palmer. 1852.

Reports of Cases argued and determined in the Supreme Court of New Brunswick. With a Table of the Names of the Cases. By John C. Allen, Esq., Barrister at Law. Containing the cases of Trinity Term in the thirteenth, and Michaelmas Term in the fourteenth year of Queen Victoria. 1850. St. John, N. B.: Printed by William L. Avery, Brunswick Press, Prince William Street. 1851.

English Reports in Law and Equity. Edited by Edmund H. Bennett and Chauncey Smith. Vol. X. pp. 657. Containing Cases in all the Courts of Equity and Common Law, during the year 1852. Boston: Little, Brown & Co.

Law Reform Tracts. Number Two. Evidence on the Operation of the Code; obtained by the English Law Amendment Society and Chancery Commission, and published in England. Republished from the Law Review and Commissioners' Report, as presented to Parliament. Paper. pp. 61. Published under the Superintendence of a Law Reform Association. New York: John S. Voorhies, Law Bookseller and Publisher, No. 20, Nassau Street. 1852.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, William H.	Needham,	Sept. 3,	William S. Morton.
Alexander, Fordyce et al.	Erving,	" 11,	D. W. Alvord.
Alexander, Luther L. et al.	Erving,	" 11,	D. W. Alvord.
Barber, James	Fall River,	" 18,	E. P. Hathaway.
Barbour, Henry M.	Worcester,	" 9,	Henry Chapin.
Barnes, David	Hubbardston,	" 7,	Charles Mason.
Bean, Joel W.	Stoneham,	" 3,	Asa F. Lawrence.
Berry, Hiram H.	Holliston,	" 6,	Asa F. Lawrence.
Brooks, E. C.	Lawrence,	" 16,	Daniel Saunders, Jr.
Bundy, George H. et al.	Boston,	" 1,	Frederic H. Allen.
Canham, William	Natick,	" 16,	Asa F. Lawrence.
Childs, Charles S.	Worcester,	" 24,	Henry Chapin
Clark, Lemuel	Boston,	" 29,	John M. Williams.
Clark, Lemuel	Boston,	" 25,	Frederic H. Allen.
Cobb, Sylvanus	Boston,	" 15,	Frederic H. Allen.
Colburn, Franklin	Barre,	" 21,	Henry Chapin.
Cook, Thomas	Lawrence,	" 21,	Daniel Saunders, Jr.
Cushman, James H.	Newton,	" 21,	Asa F. Lawrence.
Dadman, Jeduthan	Holliston,	" 1,	Asa F. Lawrence.
Drake, Wilson	New Bedford,	" 13,	E. P. Hathaway.
Edgecomb, Robert et al.	Montville, (Maine)	" 18,	Frederic H. Allen.
Fenno, James H. et al.	Abington,	" 13,	Perez Simmons.
Field, Nahum	Attleboro',	" 3,	E. P. Hathaway.
Forbes, Lewis H.	Millbury,	" 2,	Henry Chapin.
Gilbert, Henry	Cambridge,	" 18,	Asa F. Lawrence.
Gleason, Joel H.	Princeton,	" 23,	Henry Chapin.
Hale, William P.	North Brookfield,	" 29,	Henry Chapin.
Hardy, George P.	Lawrence,	" 16,	Daniel Saunders, Jr.
Hawes, Jonathan	New Bedford,	" 27,	E. P. Hathaway.
Hodges, Alonzo F.	Attleborough,	" 14,	E. P. Hathaway.
Jackson, Elphalet W. et al.	Chelsea,	" 18,	Frederic H. Allen.
Jackson, Marcus G. et al.	Liberty, (Maine)	" 18,	Frederic H. Allen.
Johnson, Jacob A.	Lynn,	" 16,	John G. King.
Lambert, Henry	Chelsea,	" 10,	Frederic H. Allen.
Lee, William	West Roxbury,	" 15,	William S. Morton.
Libby, Edward P.	Lynn,	" 28,	John G. King.
Lyon, John	Newburyport,	" 16,	Daniel Saunders, Jr.
Mason, Samuel K.	Boston,	" 8,	Frederic H. Allen.
Maynard, William L.	Lancaster,	" 29,	Henry Chapin.
Mead, Charles F.	Brookline,	" 25,	William S. Morton.
Morse, Charles	Holliston,	" 13,	Asa F. Lawrence.
Moulton, Mark D.	Medway,	" 22,	Frederic H. Allen.
Munn, Francis H.	Hadley,	" 6,	Haynes H. Chilson.
Pierce, Amos	Westminster,	" 11,	Charles Mason.
Powell, Charles T.	Roxbury,	" 27,	Frederic H. Allen.
Putnam, Franklin	Boston,	" 23,	John M. Williams.
Rand, William J.	Boston,	" 28,	Frederic H. Allen.
Ripley, Ammi R. L.	Abington,	" 30,	Perez Simmons.
Sanford, Abel B.	Taunton,	" 22,	E. P. Hathaway.
Shaw, Nathan G.	Dorchester,	" 17,	William S. Morton
Silsbee, George M.	Boston,	" 13,	Frederic H. Allen.
Small, David H.	Harwich,	" 22,	C. B. H. Fessenden.
Small, John F.	Charlestown,	" 23,	Asa F. Lawrence.
Tirrell, John	Boston,	" 23,	Frederic H. Allen.
Tobey, Franklin	New Bedford,	" 16,	E. P. Hathaway.
Tyler, Melville M. et al.	Boston,	" 1,	Frederic H. Allen.
Wallis, Levi	West Roxbury,	" 3,	John M. Williams.
Webster, Amos	Boston,	" 18,	Frederic H. Allen.
Wells, George W.	Chelsea,	" 7,	John M. Williams.
Whitcomb, Alanson S.	Boston,	" 23,	Frederic H. Allen.
Witherell, H. et al.	Abington,	" 13,	Perez Simmons.
Woodbury, George	Hamilton,	" 24,	John G King.
Works, Sarah H.	Haverhill,	" 30,	Daniel Saunders, Jr